Supreme Court, U. S.
FILED
AUG 15 1980
MICHAEL RODAK, JR., CLERK

80-224

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTINGHOUSE ELECTRIC CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*
and
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, *Intervenor.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALFRED W. VADNAIS
FRANK P. PINCHAK
HUMPHREYS, HUTCHESON & MOSELEY
The Crawford Building
308 Walnut Street
Chattanooga, TN 37403
(615) 756-5600
Attorneys for Petitioner,

MARTIN D. MINSKER
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorney for Petitioner and Counsel of Record.

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QUESTIONS PRESENTED

May the NLRB dismiss an employee petition to decertify a union in a single plant solely on the ground that the employer and the union have agreed to a multiplant bargaining unit, without any independent finding that the multiplant unit is "appropriate," as required by Section 9(b) of the Act and *National Labor Relations Board* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965).

May the NLRB nullify the statutory rights of some 45 employees in a single plant bargaining unit previously certified by the Board, by finding that the employer and the union "merged" the single plant unit into a multiplant unit of 20,000 employees in 42 other locations, thereby imposing on those employees the virtually impossible task of obtaining the support of some 6,000 employees in the nationwide unit in order to get a decertification election.

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OPINIONS BELOW

The unpublished opinion of the Court of Appeals (Pet. App. A, pp. 1a-3a, *infra*) was filed on February 19, 1980, and its order denying a petition for rehearing (Pet. App. B, pp. 4a-5a, *infra*) was filed on May 19, 1980. The relevant decisions of the National Labor Relations Board are reported at 227 NLRB 1932 (1977) (Pet. App. C, pp. 6a-14a, *infra*) 238 NLRB No. 102 (1978) (Pet. App. D, pp. 15a-28a, *infra*) and 240 NLRB No. 106 (1979) (Pet. App. E, pp. 29a-37a, *infra*).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1976).

STATUTES INVOLVED

The pertinent sections of the National Labor Relations Act, 29 U.S.C. §157, §158(a)(2) and (5), §159 (1976) are reproduced at Pet. App. F, pp. 38a-41a, *infra.*

STATEMENT OF THE CASE

1. Introduction

This case involves issues fundamental to the administration of the National Labor Relations Act, including the question whether 45 employees who certify a Union at a single plant by a one-vote margin have the correlative power to decertify that Union by majority vote 14 months later, or whether the NLRB may prevent such decertification on the basis of a finding that, subsequent to the employees' original certification, the unit was "merged" with 42 others into a multiplant unit of approximately 20,000 employees, even though no independent finding has been made by the NLRB that the multiplant unit is an appropriate one. Such an application of the National Labor Relations Act violates the statutory right to decertify which Congress deliberately granted in Section 9(c)(1)(A)(ii) of the National Labor Relations Act, as added by the Taft-Hartley Act, 29 U.S.C. §159(c)(1)(A)(ii) (hereinafter the "Act").

This case reaches far beyond the rights of just the employees in one plant, for the decision would have the same effect on all 20,000 other union-represented employees covered by the National Agreement existing between Westinghouse and the International Union of Electrical, Radio And Machine Workers (hereinafter the "Union" or "IUE"). And the holding below not only forbids employees in previously certified individual plant

units from decertifying the Union; it also effectively bars them from changing from one union to another.

Likewise the decision below would deprive some 23,000 other employees represented by other unions (*i.e.*, the International Brotherhood of Electrical Workers, the United Electrical, Radio and Machine Workers (UE) and the Federation of Westinghouse Salaried Unions), which negotiate virtually identical national agreements with Westinghouse, of the power to change unions or opt out of Union representation.[1] Consequently, if this decision is permitted to stand, the rights guaranteed to some 43,000 employees under Section 7 of the Act, 29 U.S.C. §157, will be forfeited.

Finally, this decision impacts on the rights of innumerable other employees represented by unions on a multiplant basis, such as other electrical workers, auto workers and steel workers.

The facts, as set forth more fully hereinafter, show that the Board in 1975 conducted an election among 45 employees in a single plant bargaining unit. The Board itself certified the single plant unit as appropriate under the Act. *See* pp. 6-7, *infra*. This certification was consistent with a 25-year history of bargaining relationships and certification practices among the parties and the Board. *See* pp. 5-6, *infra*. Some fourteen months later, the same employees filed a petition to decertify the Union. The Board then dismissed the petition, holding that in the interim the individual plant unit had merged into a new multiplant unit, consisting of 43 plant locations, widely scattered across the United States, and including some 20,000 persons. *See* pp. 8-9, *infra*. As a

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[1] The UE filed an *amicus* brief in the Court of Appeals below specifically urging that it, like the IUE, had a multiplant bargaining relationship with Westinghouse.

consequence, the individual plant employees can no longer secure a decertification election, unless they can now persuade 30 percent of these 20,000 employees to support the petition for decertification. *See* p. 9, *infra*. As a practical matter this decision forever locks the individual plant employees into a Union they have now indicated they do not want, and which had only prevailed, in a single plant unit election sanctioned by the Board, by one vote some 14 months earlier.

On its facts, this case probably represents one of the most extreme applications of the "merger" rationale to sustain the validity of a "multiplant" unit in labor relations history. As we discuss more fully hereinafter, the Board invoked the "merger" rationale to prohibit a decertification election without making any independent finding that the resulting merged unit was "appropriate" within the meaning of Section 9(b) of the Act, 29 U.S.C. §159(b). In this respect, we believe the Board's actions violate this Court's ruling in *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 443 (1965). *See* pp. 12-17, *infra*.

Moreover, this Court has not ruled on the manner in which the Board undertakes to reconcile its responsibilities under the Act for "unit appropriateness" determinations with the Board's policies respecting decertification petitions. Indeed, this Court has not reviewed the Board's substantive policies in making "unit appropriateness" determinations since its decision in *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146 (1941), which preceded Congress' creation of the statutory right to decertify by amendment of the Wagner Act. *See* pp. 14-15, *infra*. We believe this case provides the last good opportunity for that review, for if the rulings below were to stand, the relevant statutory policies embodied in the right to decertify would be eviscerated. *See* pp. 17-22, *infra*.

2. The Prior 25-Year Bargaining History

The IUE was established in 1949, when the UE was expelled from the CIO. For some years prior to that time, the UE had represented a large number of Westinghouse employees at various plant locations. Westinghouse and the UE negotiated at two (2) levels: national and local. Matters of universal application were incorporated in a "national" agreement, with other matters being incorporated in agreements applicable to single plant locations.

When the IUE was established, it sought a Board election in a unit consisting of all the then UE-represented plants. Westinghouse opposed this and filed its own petition seeking an election at each plant location. The Board agreed, and separate elections were conducted at each plant, with the IUE and UE each successful in a share of the locations. *See Westinghouse Electric Corp.,* 89 NLRB 8, 10 & n. 10 (1950).

Westinghouse then began negotiating with the IUE in precisely the same manner as it had with the UE. In 1951 the Union established a "Conference Board," consisting of representatives of the various Westinghouse plant "locals." The Conference Board then bargained on the "national" issues (for example, across-the-board wage increases and pensions), with the locals bargaining on local issues (for example, the actual wage rates for job classifications). The IUE and the UE, however, continued to "raid" the plant locations of each other, again with varying degrees of success.

However, in 1954, the IUE attempted to deliver a "knock-out punch" and sought a Board election in a unit consisting of all the then UE and IUE-represented

plants. Westinghouse opposed this election, contending that the single plants continued to be the only units appropriate for bargaining. Then Regional Director Penello of Region 5 of the Board dismissed this petition as seeking an election in an inappropriate unit for bargaining. This decision was affirmed by the Board in an unreported decision (B. 771):[2]

> The Board decided that because, among other things, there is no bargaining history for the plants in the proposed unit as a single unit, the plants in the proposed unit correspond to no administrative, functional or geographical division of the employer, there is no transfer or interchange of employees between the plants in the proposed unit, there is a wide disparity in the kinds of products manufactured at the plants involved, and there is no community of interest among the employees in the proposed unit, the unit sought by Appellant is not appropriate. *American Can Company,* 109 NLRB No. 160; *cf. Western Electric Company,* 108 NLRB No. 86.

Things then continued as before. "Raids" took place, and the IUE gained and lost recognition at various plants. Its 1950 contract with Westinghouse has never been terminated. Rather, the only changes that have been made relate to the separately certified plant units covered and supplemental agreements negotiated every few years.

3. The 1975 Certification Election at the Charlotte Plant

On January 14, 1975, the IUE filed a petition for an election, seeking only to represent the production and

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[2] Citations marked "B" are to the Exhibit volume to the Joint Appendix on appeal. Citations marked "A" are to the Joint Appendix on appeal.

maintenance workers at Westinghouse's apparatus service plant located in Charlotte, North Carolina (hereinafter the "Charlotte plant"). The Board agreed that the employees at this plant constituted an appropriate unit for collective bargaining purposes. During the ensuing election campaign, the employees were led to believe that they could decertify the Union later if they wanted to (A. 173, 182, 189, 224).[3] On March 13, 1975, with all eligible employees voting, the Union prevailed in this election by a one-vote margin, 23-22, and was subsequently certified by the Board as the exclusive representative of this bargaining unit.

By an exchange of letters dated March 25, 1975, and April 2, 1975, the Union and Westinghouse, pursuant to Section I of their then existing "master" or "National Agreement", agreed that the terms of that agreement, which was scheduled to expire on July 17, 1976, would apply to the Charlotte unit. This agreement, which was one of ten successive modifications of the first National Agreement between Westinghouse and the Union that became effective October 1, 1950, covers subjects of collective bargaining that are deemed by the parties to be company-wide in character and generally applicable to the various certified collective bargaining units. With the addition of the Charlotte bargaining

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[3] At least one employee testified that the Union organizer told him that a decertification election could be held after one year (A. 173). This testimony was corroborated by other employees (A. 182-83, 223-24). The Union's representative denied this, but admitted that he deliberately avoided explaining to the employees the multiplant concept because it would have been "foolish" to tell them "that they can get out when you know they can't" (A. 602-604). The Board simply ignored this testimony and made no findings on this matter. *See* Pet. App. C, pp. 6a-14a, *infra*. The lower court's opinion also ignores this matter. Pet. App. A, pp. 1a-3a, *infra*.

unit, the number of separately certified IUE units covered by the Agreement totalled 43 and were located all over the United States.

Historically, the National Agreement had been followed by a number of local supplemental agreements negotiated by each local union and each local plant management, covering a number of subjects pertaining specifically to each of the separately certified bargaining units. Pursuant to this arrangement, on July 16, 1975, eight (8) local supplements to the then existing National Agreement were negotiated and then executed by the local Charlotte plant management and the local union.[4] Each such supplement was to expire contemporaneously with the National Agreement on July 16, 1976.

4. The 1976 Attempt to Decertify and the Decisions Below

On May 5, 1976 (slightly over one year after the original certification of the Charlotte plant bargaining unit), the unit employees filed a timely petition to decertify the Union (A. 11-14, 132). The Union then contended that an election was foreclosed to the Charlotte employees because the pattern of bargaining between the Union and Westinghouse had effectively merged the 42 separately certified collective bargaining units covered by the National Agreement plus the Charlotte unit, into a single multiplant unit.

On several prior occasions during the 25-year collective bargaining history of the parties, the Board had expressly or implicitly ruled that a single multiplant unit was not an appropriate bargaining unit for

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[4] The IUE chartered a Local Union 186 to represent only the Charlotte employees. It, rather than the IUE, negotiated the local matters (A. 132-34, 162-63).

Westinghouse and the Union. *See* pp. 5-6, *supra.* In the instant case, however, the Board agreed with the Union and ruled that the Charlotte employees could not have an election, reasoning that the Charlotte unit had become merged into a single multiplant unit through the course of collective bargaining between the Union and Westinghouse (Pet. App. C, pp. 6a-14a, *infra*).

As a consequence of this ruling, the employees who work at the Charlotte plant could not secure an election to determine whether or not they would continue to be represented by the Union, unless they could first obtain the support of 30% of the widely-scattered 20,000 Union-represented employees (among the other 42 separately certified plant units covered by the National Agreement) for the petition to decertify. Moreover, to ultimately prevail the Charlotte employees would have to secure a majority of the 20,000 employees in the "multiplant" unit.[5]

The Board's decision refusing to permit the employees in the Charlotte plant to hold an election issued on January 31, 1977. *See* Pet. App. C, p. 6a , *infra.* For almost one year thereafter the Union was, at best, dormant at the plant. Local negotiations were neither held nor requested, no grievances were filed, and no attempt was made by the Union to administer or en-

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[5] It was also the Union's contention that a single multiplant unit finding would preclude any other union from seeking representational rights of the employees in any of the units covered by the National Agreement, including the Charlotte unit, unless the above requisite numbers were met. (A. 304-307, 316-317). Section 9(c)(2) of the National Labor Relations Act, 29 U.S.C. § 159(c)(2), would appear to require this result, as would long-standing Board precedent. *See, e.g., Hygrade Food Products Corp.*, 85 NLRB 841 (1949).

force any provisions of any contract with respect to those employees. Since the original decertification petition was filed, the Charlotte plant, without objection from the Union, was operated as a non-union facility in accordance with the handbook prepared for and used by such facilities. The Plant Manager dealt directly with all employees concerning wages, transfers, promotions, benefits, hours, grievances, and other terms and conditions of employment (A. 37-42).

Then on January 9, 1978, the Charlotte Plant Manager received a letter from the Union enclosing 12 dues check-off authorization cards from employees. Westinghouse returned the dues deduction cards to the Union and, because it was Westinghouse's position that the Board's Order of January 31, 1977, was incorrect, formally advised the Union that it would neither recognize nor bargain with it concerning the Charlotte employees.[6] On January 23, 1978, the Union filed an unfair labor practice charge alleging that Westinghouse violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C. §§158(a)(5) and (1), by refusing to recognize or bargain with the Union and its local as the exclusive representative of the Charlotte apparatus service plant employees. Westinghouse in its answer admitted its refusal to bargain, asserted that its position was justified inasmuch as the Board's prior opinion (Pet. App. C, pp. 6a-14a, *infra)* was wrong, and also contended that the Union, without regard to the Board's decision, had nevertheless abandoned the Charlotte bargaining unit.

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[6] A Board decision declining to hold a decertification election is not directly reviewable under the Act. The only method available to obtain review is for the employer to decline to bargain, thereby initiating against itself an unfair labor practice proceeding. *See generally Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964).

On February 27, 1978, the Union filed another unfair labor practice charge contending that Westinghouse violated Sections 8(a)(5) and (1) of the Act by failing to bargain with the Union when it established a second shift at the Charlotte plant. Westinghouse responded to this charge by asserting its earlier position and raising other specific affirmative defenses relating particularly to the "second shift" issue.

Thereafter a consolidated complaint issued from the General Counsel for the Board on both unfair labor practice charges. Subsequently the General Counsel moved, *inter alia,* for summary judgment. On September 29 1978, the Board issued a Decision and Order (reported at 238 NLRB No. 102) granting the General Counsel's motion for summary judgment and directing Westinghouse to bargain in the Charlotte unit. *See* Pet. App. D, pp. 15a-28a, *infra.*[7]

On October 3, 1978, Westinghouse filed its Petition for Review of the Board's order. Subsequently the Board filed its own Application for Enforcement and the Union intervened in the proceeding before the Court of Appeals. The Court of Appeals issued its opinion enforcing the Board's orders on February 19, 1980. See Pet. App. A, pp. 1a-3a, *infra.*

REASONS FOR GRANTING THE WRIT

In this case, the Board refused to allow a decertification election solely on the ground that the employer and the Union had, in the fourteen (14) months intervening between the initial certification and the peti-

[7] The portion of the case dealing with the second shift allegation was remanded at this point for hearing. Subsequently the Board issued a third opinion (240 NLRB No. 106) granting summary judgment on this issue. *See* Pet. App. E, pp. 29a-37a, *infra.*

tion to decertify, "merged" the Charlotte unit into a geographically dispersed multiplant unit covering some 20,000 workers. By this decision, these workers, as a practical matter, became forever locked in to this Union. In reaching this decision, the Board, in violation of this Court's holding in *NLRB* v. *Metropolitan Life Insurance Co.,* 380 U.S. 438 (1965), never made (much less explained) an independent finding that the multiplant unit was "appropriate" under §9(b) of the Act. The Court of Appeals, for its part, simply swept the basic legal issues under the "substantial evidence" rug, in violation of this Court's mandate in *NLRB* v. *Brown,* 380 U.S. 278 (1965). *See* pp. 12-17, *infra.*

In disposing of this case as it did, the Board appears to have proceeded on the premise that decertification rulings, unlike initial unit certifications, do not require a Section 9(b) "appropriate unit" determination where the employer and the union--by either express contract or agreement implied from conduct--create a larger unit than the one proposed for a decertification election. This Board policy poses vital issues respecting the interrelationship between Sections 7 and 9 of the Act, as amended by Congress since this Court last examined the Board's substantive policies respecting unit determinations. Plenary review by the Court of the Board's policies in administering the Act in these vital particulars is long overdue. *See* pp. 17-22, *infra.*

1. Under this Court's Decisions, the Board has Failed to Make A Proper Unit Determination Permitting Judicial Review

The Board in this case declined to allow an election in the Charlotte plant solely on the ground that "the record establishes a controlling history of multiplant

bargaining resulting in the establishment of a single multiplant unit embracing all those plants of the Employer in which the Union through its Conference Board has been recognized as the exclusive bargaining agent and which are covered by the national agreement" (Pet. App. C, pp. 13a-14a, *infra*). The Court of Appeals, in a three-paragraph *per curiam* opinion, simply sustained this ruling on a finding of "substantial evidence in the record as a whole to support the Board's finding that the Charlotte unit was subsequently merged into a single multiplant unit, embracing all of Westinghouse's plants" (Pet. App. A, p. 3a, *infra*), despite the observation that "admittedly, the Union (Local 186) was certified initially as the bargaining agent in a unit restricted to the employees of the Charlotte plant." *Id.*[8]

Absent from either Board or lower court opinion is any finding that the multiplant unit emerging from this "merger" process constitutes an "appropriate" unit within the meaning of Section 9 of the Act.[9] Yet the Act expressly commands, *inter alia,* that:

> The Board shall decide in *each case* whether, in order to assure to employees the fullest freedom in

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[8] The Court of Appeals stated in its *per curiam* opinion that Local 186 had been certified by the Board. *See* Pet. App. A, p. 3a, *infra.* This is incorrect. The IUE won the election in 1975 and was certified (A. 10-11). It in turn established Local 186 to represent the Charlotte employees only.

[9] In its later decision growing out of the unfair labor practice charge, the Board variously describes the multiplant unit as "a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act" (Conclusion of Law No. 3, Pet. App. D, p. 24a, *infra*) and as a unit "found by the Board to be appropriate in [the decertification opinion]" (*id.*, p. 22a, *infra*). However, those statements are based on the Board's refusal to allow relitigation of the issues decided in its earlier opinion dismiss-

> exercising the rights guaranteed by this subchapter, *the unit appropriate for the purposes of collective bargaining shall* be the employer unit, craft unit, plant unit or subdivision thereof . . . .

29 U.S.C. §159(b) (emphasis added).

Also absent from either lower court or Board opinion is any articulation of the relationship between the putative "merger" and the factors traditionally deemed to bear on an "appropriate" unit determination pursuant to Section 9 of the Act. *See Pittsburgh Plate Glass Co.* v. *NLRB,* 313 U.S. 146, 153 (1941). For these reasons the lower court's ruling must be reversed under this Court's decision in *NLRB* v. *Metropolitan Life Insurance Co.,* 380 U.S. 438, 443 (1965), wherein the Court vacated and remanded a court order ultimately resting on a Section 9(b) unit determination because of the Board's failure to articulate the basis of its determination. *Accord, NLRB* v. *Purity Food Stores, Inc.,* 376 F.2d 497, 501 (1st Cir. 1976) ("Nevertheless the Board must articulate substantial reasons for its unit determination."); *NLRB* v. *Pinkerton's, Inc.,* 428 F.2d 479, 484 (6th Cir. 1970) ("The Board in determining a proper unit for collective bargaining is required to articulate substantial reasons for its unit determination.")

The requirement of an adequate finding of "unit appropriateness" is critical to vital rights of the individual employees under the Act. The original Wagner Act did not provide specifically that employees were free

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ing the decertification petition (Pet. App. C, pp. 6a-14a, *infra*) and the concomitant granting of summary judgment against Westinghouse on that basis. *See* Pet. App. D, pp. 18a-19a, n.3 *infra*, citing, *inter alia, Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 162 (1941). *See also* Pet. App. E, pp. 32a-33a, *infra*. Therefore, those statements, (not otherwise explained), add nothing in the way of either a finding or a legal rationale to the Board's earlier decision dismissing the decertification petition.

to refrain from concerted activities, such as being represented by a union for collective bargaining purposes. Congress expressly acted to permit the exercise of that right when it enacted the Taft-Hartley Amendments in 1947. *See* H.R. Rep. No. 245, 80th Cong., 1st Sess. 26-27, (1947) *reprinted in* I NLRB Legislative History of the Labor Management Relations Act, 1947 [hereinafter "Legislative History"], at 317-18 (1948); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 38 (1947), Legislative History, at 542. Thus Section 7 of the Act was accordingly amended to permit employees to "refrain" from the exercise of their organizational rights. 29 U.S.C. §157.

Likewise, the Wagner Act did not specifically provide a vehicle whereby employees could decertify their union, and §9(c)(1)(A)(ii), 29 U.S.C. §159(c)(1)(A)(ii), was enacted to clearly establish that right. H.R. Rep. No. 245, *supra,* at 35, Legislative History, at 326. Thus Taft-Hartley specifically provided that employees were free not to join a union; it also established a method for represented employees to decertify their union.

Section 9(b) of the present labor laws was rewritten to require the Board, when making bargaining unit determinations, to heed the basic purposes of the Act:

> It must be emphasized that one of the principal purposes of the National Labor Relations Act is to give employees full freedom to choose or not to choose representatives for collective bargaining or concerted activities . . . . This additional guarantee . . . . will, it is believed, through wise administration result in a substantially larger measure of protection of those rights when bargaining units are being established than has heretofore been the practice.

H.R. Conf. Rep. No. 510, *supra* at 47, Legislative History, at 551.

The vital importance of the statutory policies embodied in Section 7 of the Act, as amended, renders all the more egregious the lower court's decision here, which simply sweeps this case under the all-too-familiar "substantial evidence" rug. As this Court stated in *NLRB* v. *Brown*, 380 U.S. 278, 291-92 (1965):

> Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.

See also American Ship Building Co. v. *NLRB,* 380 U.S. 300, 318 (1965) ("The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.")

In *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973), this Court held that a Board-sanctioned union practice of promising waivers of initiation fees to employees signing union authorization cards prior to an election violated the Act. Therein, the Court observed, respecting Section 7 of the Act and the employees' right "to refrain from any or all of such [collective bargaining] activities" that:

> Any procedure requiring a "fair" election must honor the right of those who oppose a union as well as those who favor it. *The Act is wholly neutral when it comes to that basic choice.*

414 U.S. at 278 (emphasis added). Yet the unit appropriateness question is far more vital to the fair administration of the Act than the types of election procedures at issue in *Savair*. We submit that a reviewing court wholly fails to discharge its critical function of

assuring Board neutrality in administration of the Act when it invokes the "substantial evidence" incantation to sustain a Board ruling that on its face is devoid of the finding or reasoned elaboration critical to the Act.[10]

2. This Court Should Grant Plenary Review to Ascertain Whether the Board's Current Use of the "Merger" Rationale Comports with the Fundamental Policies of the Act

Prior to the merger of the AFL and CIO, cases involving questions of merger were more common, simply because there were numerous attempts to "raid" represented plants by rival unions.[11] During that period

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[10] Subsequent to its "merger" finding in this case, the Board decided *White-Westinghouse Corp.*, 229 NLRB 667 (1977), *enforced sub nom. IUE* v. *NLRB*, 604 F.2d 689 (D.C. Cir. 1979). *White-Westinghouse* involved five (5) former Westinghouse plants that had comprised the appliance division of Westinghouse, which had been sold by Westinghouse to an independent corporation (which then formed a wholly owned subsidiary named "White-Westinghouse.") In *White-Westinghouse,* the question was whether this successor-employer was obligated to bargain on a multiplant basis. In finding such an obligation, both the Board and the Court of Appeals relied on the existence of a merger through multiplant bargaining by petitioner here and the IUE preceding the sale of the plants to White-Westinghouse's parent. But--in sharp contrast to the decisions at issue in the instant petition--both the Board and the Court of Appeals in *White-Westinghouse* took care to make and explain an express finding that the five plants there involved constituted an appropriate unit under Section 9(b) of the Act. *See White -Westinghouse Corp.*, 229 NLRB 667, 674-75 (1977); *IUE* v. *NLRB*, 604 F.2d at 695-96. That, of course, is precisely what both the Board and the lower court here failed to do.

[11] "Raids" are now virtually non-existent, primarily because the AFL-CIO prohibits such competition between member unions. Also, numerous "no-raid" pacts exist between AFL-CIO unions and non-members, such as that which now exists between the IUE and UE. Moreover, the Board will enforce these agreements. *See* NLRB, *Casehandling Manual (Representation Cases)* §§11050 *et. seq.* Thus, a "raid" on the IUE-represented multiplant unit is impossible, and the employees are effectively "locked-in" forever.

of time, the Board would determine whether the large bargaining unit, created by the employer and the union, was in fact an appropriate one. If the employer and the union had created a bargaining unit comprised of geographically scattered plant locations, where there was no interchange of employees, the Board would permit an election at single plant locations upon the petition of a rival union. The policy in those days was as follows:

> Much less is it a rule of this Board to find appropriate any unit that may have been desired and agreed upon by the employer and a bargaining representative in the past where, as here, that unit does not conform reasonably well to other standards of appropriateness. Section 9(b) of the Act provides 'the Board shall decide,' and in *each case,* what unit is appropriate for collective bargaining purposes.

Hygrade Food Products Corp., 85 NLRB 841, 847 (1949) (emphasis in original, footnote omitted).

In the instant case, the Board appears to have proceeded on the premise that because the employees were seeking to decertify the union, no independent finding or explanation of unit appropriateness under Section 9(b) of the Act was required. Thus the Board, after finding a "merger", states "we shall therefore dismiss the petition since it is not coextensive with the recognized and established bargaining unit" (Pet. App. C, p. 14a, *infra).* The Board appears to be invoking its rule that:

> [I]n decertification cases the appropriate unit in which to conduct an election is the certified *or* contract unit. If the certified unit has been changed by contract, the Board relies upon the unit recognized by collective bargaining and on that basis holds an election to determine whether the employees wish to continue being represented.

Brom Machinery & Foundry Co. v. *NLRB*, 569 F.2d 1042, 1043 (8th Cir. 1975) (*quoting Continental Can Company,* 217 NLRB 316, 317 (1975)).

But this rule permits a large employer and a union representing its employees at various plant locations to simply agree to "merge" those plants into one unit, thus effectively denying the employees at each plant the opportunity to decertify or select another union. Such a rule is, on its face, completely contrary to Section 9(b) of the Act. Further, it denies to employees their rights under Section 7 of the Act and also conflicts with the policy of the Act as expressed in other provisions of the Act.

Section 8(a)(2) of the Act makes it an unfair labor practice for an employer to defeat employees' self-determination rights by lending unlawful assistance to a labor organization. Thus it is improper for an employer to recognize as an exclusive bargaining agent a union lacking majority support among the employees. Of course, a union which accepts such recognition without majority support violates Section 8(b)(1)(A) of the Act. *See generally International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961).

In *Colecraft Manufacturing Co.* v. *NLRB,* 385 F.2d 998 (2d Cir. 1969), the court held that an employer was not permitted, nor could it be required, to bargain with a union in an inappropriately large bargaining unit--even if the majority of employees in that unit supported the union. If it did so, according to the Second Circuit, the employer "could be charged with violating Section 8(a)(1) by impairing the Section 7 rights of the employees improperly included in the unit who did not wish to be represented by the union." 385 F.2d at 1007.

We submit that a multiplant unit based exclusively on a finding of "merger" must be viewed — in the absence of any express finding of unit appropriateness or explanation of the relationship between the "merger" and factors traditionally thought to govern unit appropriateness — as the analytical equivalent of a unit created by agreement of the employer and Union. Here the Board has found and tolerated the equivalent of an agreement (albeit implied from conduct) between an employer and a union that serves to permanently deprive the employees of future Section 7 rights.[12]

The current use of the "merger" rationale by the Board fails to comport even with this Court's principles for administration of the Act as stated in *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146 (1941), a decision *preceding* the Wagner Act's amendment by Taft-Hartley. *See* pp. 14-15, *supra*. *Pittsburgh Plate Glass* involved a Board decision holding that all six (6) plants of the employer's flat glass division constituted an appropriate unit for bargaining under Section 9(b) of the

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[12] That employees' Section 7 rights cannot be defeated by an agreement between an employer and a union can also be seen from the Board's contract bar rule. The existence of a valid collective bargaining agreement will block an attempted decertification or petition by a rival union, but for no longer than three (3) years. *General Cable Corp.*, 139 NLRB 1123 (1962).

In a 1971 decision by a Board of different composition, where the Board found that the parties had created a multiplant unit, the Board still permitted decertification elections at several plant locations because, in the Board's view of the record in that case ". . . an insufficient time has elapsed since certification or recognition as separate units for the purposes of collective bargaining to warrant the finding that these steam plants have been irrevocably amalgamated into the larger collective bargaining units" *See Duke Power Co.*, 191 NLRB 308, 312. The Board should have permitted the Charlotte employees a similar opportunity.

Wagner Act, 49 Stat. 453, prior to its amendment by Taft-Hartley. The union that was certified by the Board possessed majority strength at five (5) of the plants, but another union was in a majority at the sixth (6th). The employer refused to bargain with the certified union at the sixth (6th) plant, and the case reached the courts after the Board found a Section 8(a)(5) violation in this regard. This Court recognized that the Wagner Act delegated authority to the Board to determine the appropriateness of bargaining units. 313 U.S. 152-53, 165-66. It also found that there was a sufficient community of interest among the employees at all six (6) plants to support the Board's conclusion that a division-wide unit was appropriate. 313 U.S. 164-65.[13]

In the instant case, however, not only did the Board fail to even determine whether the multiplant unit was appropriate, but it can readily be seen that it is not. The multiplant unit resulting from the Board's decision cuts across geographical, functional and divisional lines of the employer, and there is simply no community of interest among the covered employees. The multiplant unit here includes plants producing virtually every type of product manufactured by Westinghouse. It includes non-manufacturing facilites. It excludes plants within the same divisions from which other plants are included. Where jobs are identical within the unit, wages vary from plant-to-plant (A. 129-31; 157-58; 192-98). The only thing in common among all of the employees in the multiplant unit are: (1) the same employer; (2) the same union; and, (3) a permanent loss of their Section 7 rights to alter their representational status.

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[13] One consideration in this decision was that the employer could use the sixth (6th) plant to operate during a strike if it were excluded from the division-wide bargaining unit. Such a consideration would no longer be valid today, because Section 7 of the Act, as amended by Taft-Hartley, allows employees to refrain from strike activity.

Of course, since this Court's decision in *Pittsburgh Plate Glass*, Congress has specifically recognized the employees' rights to refrain from collective bargaining activities and created the correlative right to decertify. Indeed, the legislative history of the Taft-Hartley amendments to Section 9(b) reveals specific congressional criticism of the Board's holding in *Pittsburgh Plate Glass*:

> The act says that the Board shall determine in each case whether the "appropriate unit" is "the employer unit, craft unit, plant unit, or subdivision thereof." Under this broad grant of authority, the Board often has acted in a way that has seemed arbitrary, and it has shown little regard for distinguishable minorities that did not wish a union to represent them, and has forced many such minorities into bargaining units against their will. The Board seems to have wished to make bargaining units as large as it could, notwithstanding that its policy deprived large minorities of that freedom to decline to bargain collectively that the Labor Act and the Norris-LaGuardia Act both declare to be our National policy. [Citation omitted]. The Board has gone far in this. Although the employees in several plants or mines may wish one union, or no union at all, to represent them, the Board may include these employees in a single unit with employees in other plants or mines who wish another union as their representative and who, by greatly outnumbering them, can force upon them a bargaining agent they do not choose. *See Matter of Pittsburgh Plate Glass Co.*, 10 NLRB 1470 (1939) [other citations omitted]. [14]

H.R. Rep. 245, *supra* at 36-37, Legislative History, at 327-28.

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[14] The citation is incorrect: 10 NLRB 1470 is the citation to the Board's decision in *Libbey-Owens-Ford Glass Co.* However, that case involved the same union and the same principles as involved in

Yet, this Court has not examined the Board's substantive principles for administration of the Act in these vital particulars since *Pittsburgh Plate Glass Co.* Indeed, this Court has never passed on the Board's utilization of the "merger" rationale to defeat the statutory right to decertify created by the Congress in 1947. The decisions below in this case surely demonstrate that plenary review by the Court of the manner in which the Board is reconciling Section 7 rights in this area with Section 9 unit determinations is long overdue.

CONCLUSION

In the instant case, the Charlotte employees voted for the IUE by a one (1) vote margin. They were never informed that they would become part of a multiplant unit for decertification purposes, and they had no voice in the decision to include them in one. To the contrary, they had been led to believe that they could decertify the Union after one (1) year.[15] The Board's decision denying them that opportunity is totally contrary to the Act and to its legislative history. Moreover, as a direct practical consequence, the Board's decision obliterates the Section 7 rights of some 20,000 employees to change Unions or decertify their Union.

Pittsburgh Plate Glass. Thus, whichever case the House Report was referring to is of little consequence, as its criticism would equally apply to both decisions.

[15] The Board concluded that the Charlotte employees "had sufficient notice" that they would be merged into a multiplant unit (and thereby lose the right to decertify or change unions) when the National Agreement was made applicable to them. Pet. App. C, p.13a, *infra.* The Board reasoned that "copies of the national agreement were widely distributed prior to the representation election and that coverage of the Charlotte employees was a key element of the representation campaign." *Id.* Even putting aside the circumstances

For the reasons stated herein, the petition for writ of certiorari should be granted.

Respectfully submitted,

ALFRED W. VADNAIS
FRANK P. PINCHAK
HUMPHREYS, HUTCHESON & MOSELEY
The Crawford Building
308 Walnut Street
Chattanooga, TN 37403
(615) 756-5600

Attorneys for Petitioner,

MARTIN D. MINSKER
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorney for Petitioner and Counsel of Record.

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ignored by the Board--that the employees were affirmatively led to believe they could decertify (*see* note 3, *supra*)--this reasoning is irrational.

It is wrong to hold the Charlotte employees have forever surrendered their most fundamental statutory rights on the ground that they failed to prophesize the Board's "merger" rationale--based on inclusion under the National Agreement--when decertification of the Union was sought some fourteen months later in the identical unit the Board and the parties had agreed was appropriate at the time of initial certification. Such reasoning presumes the employees' ability to predict the Board's future legal reasoning to a result that (to the employees) would appear to contradict the Board's own conduct in sanctioning the initial election in a single plant. And there can be no claim on the record in this case that the employees were informed that coverage under the National Agreement would carry with it a concomitant loss of decertification rights at their plant.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Unpublished

No. 78-1691

Westinghouse Electric Corporation, *Petitioner,*

v.

National Labor Relations Board, *Respondent.*

International Union of Electrical, Radio and Machine Workers, *Intervenor.*

United Electrical, Radio and Machine Workers of America, *Amicus.*

Petition for review of order of National Labor Relations Board

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No. 79-1246

National Labor Relations Board, *Petitioner,*

v.

Westinghouse Electric Corporation, *Respondent.*

International Union of Electrical, Radio and Machine Workers, *Intervenor.*

United Electrical, Radio and Machine Workers of America, *Amicus.*

Application for enforcement of a supplemental order of the National Labor Relations Board.

Argued January 9, 1980 Decided February 19, 1980

Before WINTER and PHILLIPS, *Circuit Judges,* and STAKER, *District Judge.**

Alfred W. Vadnais (Frank P. Pinchak, Humphreys, Hutcheson & Moseley on brief) for Petitioner Westinghouse Electric Corporation; Collis Suzanne Stocking, NLRB (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Paul J. Spielberg, Deputy Assistant General Counsel on brief) for NLRB; James G. Mauro, Jr. (Winn Newman, Woody Peterson on brief) for Intervenor, International Union of Electrical Radio and Machine Workers, AFL-CIO-CLC.

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*Honorable Robert J. Staker, United States District Judge for the Southern District of West Virginia, sitting by designation.

PER CURIAM:

Westinghouse Electric Corporation (Westinghouse) admittedly withdrew recognition of and declined to bargain with, the International Union of Electrical, Radio and Machine Workers (the Union) with respect to employees at Westinghouse's Charlotte, North Carolina facility. It seeks to justify its action and to have the Board's remedial order set

aside on the ground that the Board improperly declined to conduct an election to decertify the Union there.

Admittedly, the Union (Local 186) was certified initially as the bargaining agent in a unit restricted to the employees of the Charlotte plant. But we think that there is substantial evidence in the record as a whole to support the Board's finding that the Charlotte unit was subsequently merged into a single multiplant unit, embracing all of Westinghouse's plants. As a consequence, it was not improper for the Board to refuse to conduct a decertification election restricted to the Charlotte unit.

Perceiving no meritorious defense to the bargaining order, we grant enforcement.

ENFORCEMENT GRANTED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Unpublished

No. 78-1691

Westinghouse Electric Corporation, *Petitioner,*

v.

National Labor Relations Board, *Respondent.*

International Union of Electrical, Radio and Machine Workers, *Intervenor.*

United Electrical, Radio and Machine Workers of America, *Amicus Curiae*

No. 79-1246

National Labor Relations Board, *Petitioner,*

v.

Westinghouse Electric Corporation, *Respondent.*

International Union of Electrical, Radio and Machine Workers, *Intervenor.*

United Electrical, Radio and Machine Workers of America, *Amicus Curiae*

Order

Filed May 19, 1980

Upon consideration of the petition for rehearing and suggestion for rehearing en banc filed on behalf of Westinghouse Electric Corporation, and no judge having requested a poll on the suggestion for rehearing en banc.

IT IS ADJUDGED and ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Winter with the concurrence of Judge Phillips and Judge Staker, U.S. District Judge for the Southern District of West Virginia.

For the Court,
/s/ WILLIAM K. SLATE, II
William K. Slate, II
Clerk

APPENDIX C

Westinghouse Electric Corporation and Robert J. Hurtt, Petitioner and International Union of Electrical Radio & Machine Workers, AFL-CIO-CLC and its Local 186.[1] Case 11-RD-247

January 31, 1977

DECISION AND ORDER

By Chairman Murphy And Members Fanning And Jenkins

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer George Carson on July 28 and 29 and August 11, 12, and 13, 1976, and before Hearing Officer Martin Ball on September 1, 1976. Following the hearing, pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, this case was transferred to the National Labor Relations Board for decision. Thereafter, Petitioner, Employer, and the International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC (hereafter Union or IUE) filed briefs.[2] The Union also filed a motion to dismiss which the Employer and Petitioner have opposed.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

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[1] The name of the Union appears as amended at the hearing.

[2] The United Electrical, Radio and Machine Workers of America and the International Brotherhood of Electrical Workers, AFL-CIO, intervened in this proceeding. Neither organization appeared at the hearing but an *amicus curiae* brief was filed by the United Electrical, Radio and Machine Workers of America.

Upon the entire record in this case, including the briefs, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner, an employee of the Employer, asserts that the Union, a labor organization, is no longer the representative, as defined in Section 9(a) of the Act, of the employees designated in the petition.

3. The Petitioner seeks to decertify the Union as the representative of all production and maintenance employees of the Employer at its Charlotte, North Carolina, Apparatus Service Plant, but excluding professional, technical, and office clerical employees, guards, and supervisors as defined in the Act. The Union contends that the petition should be dismissed because the unit in which the Petitioner seeks an election is not coextensive with the recognized multiplant collective-bargaining unit. The Employer and the Petitioner claim that the individually certified bargaining unit is the appropriate unit in which the election should be held.

The record shows that on March 21, 1975, the Union was certified as the bargaining agent for all production and maintenance employees at the Charlotte plant. Subsequently, on March 25, 1975, pursuant to Section I of a preexisting national agreement, executed by the Employer and the Union, the president and secretary of the Union assented to the application of the national agreement to the employees in the Charlotte unit. (Details of the national agreement will be discussed below.) In a letter dated April 2, 1975, the Employer acknowledged the Union's assent. Thereafter, on May 5, 1976, the decertification petition in this case was timely filed with the National Labor Relations Board.

Since 1951, the Union or its locals have been certified by the Board as bargaining agent for units of Westinghouse employees on a plant-by-plant basis. In that year, the IUE-

Westinghouse Conference Board was established, pursuant to a constitutional provision, "for the purpose of coordinating the collective-bargaining activities of local unions which . . . deal with employers having many plants. . . ." According to the Union's constitution, the Conference Board is to consist of delegates from each of the locals falling within the Board's jurisdiction. The number of delegates from each local varies from one to four, depending on the number of employees represented by the local. These delegates, in turn, elect a negotiating committee, in this case consisting of 12 individuals, who meet with representatives of the Employer at a centralized location and negotiate the terms of a national agreement. After an agreement is tentatively drafted, the Conference Board meets and decides whether it should be ratified. If the Conference Board decides to ratify the agreement, its terms become applicable to all local units under the jurisdiction of the Conference Board, without exception.

At the time the Charlotte unit first joined the other units covered by the Westinghouse-IUE national agreement, Section XX of the 1973-76 agreement was in force. That section states, "This Agreement expresses the understanding of the parties in respect to matters deemed by them to be Company-wide and generally applicable to the various collective-bargaining units. . . ." In this same section, the national agreement also provides for the creation of supplements, negotiated locally, as follows:

> All agreements made locally, other than agreements as to settlement of specific grievances, shall be embodied in local supplements to this Agreement, agreed upon by the respective Locals and local Managements. Such local supplements shall be in writing and shall cover the procedures for administering the provisions contained in this Agreement and other items of collective bargaining not Company-wide in character and generally applicable to the various collective bargaining units.
>
> Matters negotiated but not agreed upon at the national

level are subject to further negotiation at the local level. National representatives of both parties are sometimes present during local negotiations, but their presence is not required. Since the local supplements are subordinate to the national agreement, the Conference Board has the authority to review and approve the local supplements. However, the scope of review is limited to determining only whether the local supplements conflict with the terms of the national agreement.

The Westinghouse national agreement covers such substantive terms as general wage increases, cost-of-living adjustments, overtime pay, holidays, vacations, a four-stage grievance procedure, arbitration, hours of work, a limited no-strike provision, and general seniority rules. Under the terms of the recognition provision in the agreement:

> The Company agrees to recognize the Union, on behalf of and in conjunction with its locals, for those units where the Union or its locals, through a lawful National Labor Relations Board certification, have been lawfully designated as the exclusive bargaining representative for the purposes of collective bargaining. . . .

The national agreement uniformly refers to the locations within its coverage as "units," and an appendix lists and describes these units in detail.

There is also a provision describing the procedure to be followed for the inclusion of additional units which become certified after the ratification of the national agreement. In pertinent part, it provides:

> Any units for which the Union or any of its Locals shall be lawfully certified by the National Labor Relations Board as the exclusive bargaining representative, shall, upon assent in writing to this Agreement by such representative, be included in and covered by this Agreement as of the date of certification, except that either party may withhold the application of those portions of

> this Agreement considered inapplicable to such units by giving written notice of the other party within thirty (30) days of such representatives' assent.

It was through the application of this assent procedure that the Charlotte local first joined the units covered by the national agreement. The local supplements that have been agreed upon concerning the Charlotte plant cover such matters as the progression in wage rates for new employees, shift hours, composition of the local bargaining committee, the recognized bargaining unit, and specific procedures involving overtime, grievances, and seniority. Wage rates were established locally.

During national negotiations, strikes may be called by the Conference Board. If this should occur, all locals would be obligated to obey the Conference Board's instructions in this regard. During local negotiations or as a result of unresolved grievances, strikes also may be called by the locals on a single plant basis. The Union's constitution states that locals may not strike without the prior authorization of the IUE president, but this provision applies to all units, whether or not they are under the jurisdiction of a national agreement. Additionally, article XVI of the constitution provides:

> A strike duly called by a local union or by a Conference Board on behalf of its component locals under its rules, and in accordance with the terms of a collective bargaining agreement or following the termination thereof, shall be deemed to be authorized.

Under another provision in the national agreement, the termination of the national agreement automatically terminates all local supplements. However, if an individual unit exercises its right to strike over the terms of a local supplement, Section XX of the agreements applies:

> Either the Company or the Union shall have the right to terminate this Agreement and all local supplements insofar as they apply to such bargaining unit or units upon giving the other party not less than three (3) days written

notice of such termination during the continuation of such strike.

Neither party to the agreement has ever attempted to use this termination procedure.

Based on the foregoing facts, we are not persuaded that Local 186 has retained a sufficiently separate, independent bargaining position from the other locals comprising the Conference Board in matters of collective bargaining for the employees at the Charlotte, North Carolina, Apparatus Service Plant to be considered a separate unit at this time. Rather, we are of the opinion that Local 186 of the Union has engaged in multiunion bargaining with the other union locals and that the said employees have been merged into a single multiplant unit.

In making this decision, we note that this case closely parallels *General Electric Company,* 180 NLRB 1094 (1970). In that decision, the Board dismissed a decertification petition for a single plant unit of General Electric employees represented by the same union involved in the instant petition. There, a structurally identical conference board also had been created in 1951 covering all union employees of General Electric. In both cases the same union constitution defined the negotiating power of the Conference Board, its relation to the various locals, and provided that only the Conference Board could ratify the national agreement. Furthermore, the resulting national agreement between the Union and General Electric covering the latter's employees is in many respects similar to the Westinghouse agreement. Both agreements provide for wage increases,[3] working hours, vacations, holidays, a grievance and arbitration procedure, and subordinate supplemental agreements. The differences in the terms of the two national agreements, while not insubstantial, are not so great as to warrant a contrary finding here on the issue of merger.[4]

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[3] In *General Electric* wage rates were negotiated locally, and general wage increases were negotiated nationally.

[4] Under the *General Electric* agreement newly certified units were automatically included within the coverage of the agreement. The

Moreover, it is clear that the Westinghouse Conference Board is the preeminent collective-bargaining agent for all employees represented by the Union at Westinghouse. Each local is represented on the board, but all decisions are rendered collectively. The record reveals that it is the Union's officers and not local agents who make the decision whether to include newly certified local units and that the decision has uniformly been in favor of adding newly certified units. The national agreement itself states that no local supplements may conflict with it and that the agreement covers all company-wide terms. It is evident that the parties also may place in the agreement terms that vary in their application to individual plants. For example, in the 1976-79 national agreement, a term was added providing for a special skills increase that varied greatly in its application to different plants. It therefore is evident that the national agreement is not limited in the scope of its application, and many contain terms both national in scope and those of only local consequence. Such an agreement in not "merely a basic agreement for convenience in bargaining for whatever local units may be represented by the Union." *Radio Corporation of America,* 121 NLRB 633, 644 (1958).

It is true that the national agreement repeatedly refers to "units." However, neither the presence of such references nor the general provision for local supplements is inconsistent

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Westinghouse agreement merely provides that the Union may assent to the inclusion of a newly certified local under the national agreement. The unilateral nature of the provision, together with its consistent application to all newly certified bargaining units, render the two provisions essentially identical. Second, the *General Electric agreement* did not list the local units covered in as much detail as in the Westinghouse agreement. In both agreements the location, the local involved, and description of employees represented are listed. Any distinction between the two documents in this regard are merely stylistic. Finally, in the *General Electric* agreement, there was no provision for strikes at the local level or for the possible termination of the agreement at such striking units. We do not consider that this sole distinction outweighs all of the similarities between the two agreements.

with a finding of multiplant bargaining. *Atlantic Richfield Company,* 208 NLRB 142, 144 (1974); *General Electric Company, supra.*

Furthermore, the failure of the Union to raise the merger argument regarding prior decertification petitions at single plants, and in cases involving elections where it is the incumbent representative, does not prevent the Union from raising the issue at this juncture. All proceedings cited by the Employer on this point are too remote in time, the latest of those proceedings occurring in 1963, to have much bearing on this case.

While we are not unmindful that the unit involved here was certified only 14 months prior to the filing of the decertification petition, we conclude that this fact does not preclude a finding of merger. At the hearing, there was uncontradicted evidence that copies of the national agreement were widely distributed prior to the representation election and that the coverage of the Charlotte employees was a key element of the representation campaign. There is no evidence that the Charlotte unit resisted in any way its amalgamation with the other groups or employees. While *General Electric, supra,* did not indicate the length of the bargaining history of the individual unit there involved, other Board decisions have found that mergers of separate bargaining units have occurred as a result of multiplant agreements in timespans of little more than a year. *Gould-National Batteries, Inc.,* 150 NLRB 418 (1964); *Owens-Illinois Glass Company,* 108 NLRB 947 (1954). We are therefore of the opinion that the employees of the Charlotte unit had sufficient notice that the unit's inclusion within the national agreement would entail a merger with a multiplant unit.

In view of the foregoing, we conclude that the record establishes a controlling history of mulitplant bargaining resulting in the establishment of a single multiplant unit embracing all those plants of the Employer in which the Union through its Conference Board has been recognized as the ex-

clusive bargaining agent and which are covered by the national agreement. We shall therefore dismiss the petition since it is not coextensive with the recognized and established bargaining unit.

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 11—CA—7419
11—CA—7486

WESTINGHOUSE ELECTRIC CORPORATION

AND

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL—CIO—CLC

Decision And Order

Upon charges filed on January 23, 1978, and February 27, 1978, by International Union of Electrical, Radio and Machine Workers, AFL—CIO—CLC, herein called the Union, and duly served on Westinghouse Electric Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 11, issued a consolidated complaint on April 6, 1978, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that following the dismissal by the Board of a decertification petition in Case 11—RD—247,[1]

[1] Official notice is taken of the record in the representation proceeding, Case 11—RD—247, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

Westinghouse Electric Corporation, 227 NLRB 1932 (1977), and commencing on or about January 2, 1978, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative of production and maintenance employees at the Respondent's apparatus repair plant at Charlotte, North Carolina, although the Union has requested and is requesting it to do so. Respondent filed a timely answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On May 25, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on June 2, 1978, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On June 23, 1978, Respondent filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling On The Motion For Summary Judgment

In its answer to the complaint and in its opposition to the Motion for Summary Judgment, Respondent admits the Union's certification and admits the Union's request and Respondent's refusal to bargain. Specifically, Respondent admits the allegations of the complaint that it refused to accept or otherwise process grievances on January 2 and 3, 1978, and on several separate occasions thereafter; that it formally withdrew recognition of the Union by a letter dated January 17, 1978, and that it continues to refuse to recognize the Union as the collective-bargaining agent for its employees in the appropriate unit; that Plant Manager R. M. Alexander

stated to bargaining unit employees on or about January 19, 1978, that he would discuss with them any problems on a one-to-one basis, but would not handle such problems with or through the Union; and that it has since on or about January 23, 1978, refused to honor the dues-checkoff provision of the collective-bargaining contract. Respondent denies, however, that it refused to bargain in good faith with the Union by unilaterally establishing a second-shift operation among unit employees in its Charlotte, North Carolina, plant.

We grant summary judgment with respect to the allegations of the complaint that Respondent refused to bargain with the Union as the exclusive collective-bargaining representative of all employees in the appropriate bargaining unit. We find, however, that a genuine issue of material fact exists as to the allegation of the complaint that Respondent violated Section 8(a)(5) of the Act by unilaterally establishing a second-shift operation. We therefore remand that issue to the Regional Director for hearing thereon.

Review of the record herein reveals that the Union filed a petition on January 14, 1975, in Case 11—RC—3993. On February 11, 1975, a Stipulation for Certification Upon Consent Election was approved by the Regional Director, and the election was held on March 13, 1975. The Union won the election by a vote of 23 to 22 with no challenged ballots. No objections to the election were filed and the Regional Director issued a Certification of Representative on March 21, 1975. Subsequently, on March 25, 1975, pursuant to section I of a preexisting national agreement executed by the Employer and the Union, the president and secretary of the Union assented to the application of the national agreement to the employees in the Charlotte unit. In a letter dated April 2, 1975, the Employer acknowledged the Union's assent. Respondent and the Union are parties to the current national collective-bargaining agreement with a duration of 3 years from July 20, 1976, until July 16, 1979.

On May 5, 1976, a decertification petition was filed with the Board. On January 31, 1977, in *Westinghouse Electric*

Corporation, 227 NLRB 1932 (1977), we found that the union local at the Charlotte plant had engaged in multiplant bargaining with other union locals and that the employees in the local unit had been merged into a single multiplant unit. Accordingly, we held that the petition was not coextensive with the recognized and established multiplant bargaining unit and we dismissed the petition.

As mentioned previously, Respondent admits to all but one of the refusal-to-bargain allegations of the complaint. However, Respondent raises as a defense its "objective" and "reasonable" belief that the Union no longer enjoyed majority status among the unit employees in its Charlotte, North Carolina, plant. Respondent bases this belief on the decertification petition filed on May 5, 1976, discussed above, and on the alleged lack of union activity within the Charlotte plant since the date of the filing of that petition.

Inasmuch as in *Westinghouse Electric Corporation, supra,* we found that the union local at the Charlotte plant had merged into the multiplant unit, Respondent's asserted "reasonable" doubt as to the Union's majority status at the Charlotte plant is immaterial and is no defense to the allegations of the complaint.[2] By asserting that the Union no longer enjoys majority status within the Charlotte plant and that this alleged loss of majority status at the Charlotte plant privileged Respondent's conduct as admitted in the answer, Respondent is attempting to relitigate issues that were decided in the decertification case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a

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[2] It is well settled that the merger of separately certified units, in effect, destroys the separate identity of the individual units. *General Electric Company,* 180 NLRB 1095 (1970). It is also well settled that, after such merger, insistence on separate bargaining in the single plant units where the union or its locals were originally certified or recognized is violative of the Act. See *White-Westinghouse Corporation, a wholly-owned subsidiary of White Consolidated Industries, Inc.*, 229 NLRB 667 (1977).

respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding concerning its refusal to bargain with the Union as the exclusive bargaining representative of all the employees in the appropriate unit were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment with respect to Respondent's refusal to bargain with the Union as the exclusive collective-bargaining representative of all the employees in the appropriate bargaining unit.

With respect to Respondent's alleged unilateral institution of a second-shift operation, however, we withhold summary judgment. In its complaint and Motion for Summary Judgment, General Counsel alleges that Respondent unlawfully established a second shift without notice and without consultation with the Union. In support of its motion General Counsel asserts, and Respondent admits, that Respondent and the Union are parties to a current national collective-bargaining agreement with a duration of 3 years from July 20, 1976, until July 16, 1979. General Counsel also asserts that Respondent and the Union are parties to a local supplemental agreement for the Charlotte facility dated July 20, 1976. The General Counsel further asserts that this local supplemental agreement covers the establishment of new shifts and changes in existing shift schedules. Respondent specifical-

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[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

ly denies the existence of any local supplemental agreement covering the Charlotte plant. Respondent maintains that even assuming, *arguendo,* that the national agreement currently in effect covers the employees in the Charlotte plant, there is unambiguous language in that agreement conferring on Respondent the right unilaterally to establish a second shift. Inasmuch as the General Counsel's submission of exhibits in support of the Motion for Summary Judgment does not include a copy of the alleged local supplemental agreement covering the Charlotte plant, we find that a genuine issue of material fact exists as to Respondent's alleged unilateral action in establishing the second shift. Accordingly, we shall remand the instant case to the Regional Director for the sole purpose of holding a hearing before an Administrative Law Judge to determine whether or not the establishment of a second-shift operation was an unfair labor practice as alleged in the complaint.

On the basis of the entire record, the Board makes the following:

Findings Of Fact

I. The Business of the Respondent

Respondent, a Pennsylvania corporation, is now and has been at all times material herein doing business at numerous locations throughout the United States. At its Charlotte, North Carolina, facility, Respondent is engaged in the business of rendering service for motors, transformers, and other electrical products sold to its customers. During the past 12 months, which period is representative of all times material herein, Respondent received at its Charlotte, North Carolina, facility materials valued in excess of $50,000 from points located directly outside the State of North Carolina.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and

(7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

International Union of Electrical, Radio and Machine Workers, AFL—CIO—CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceedings

1. The original unit

On March 13, 1975, a majority of the production and maintenance employees employed at Respondent's Charlotte, North Carolina, apparatus repair plant in a secret-ballot election conducted under the supervision of the Regional Director for Region 11 designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees on March 21, 1975, in the following appropriate unit:

> All production and maintenance employees of the Employer at its Apparatus Repair Plant, 920 Eastway Driver, Charlotte, North Carolina, but excluding professional, technical, office/clerical employees, guards and supervisors as defined in the Act.

On March 25, 1975, pursuant to Section I of a preexisting national agreement, the Union assented to the application of the national agreement to the employees in the Charlotte unit. In a letter dated April 2, 1975, the Employer acknowledged the Union's assent. Respondent and the Union are parties to the current national collective-bargaining agreement with a duration of 3 years from July 20, 1976, until July 16, 1979.

2. The decertification petition

On May 5, 1976, a petition was filed seeking decertification of the Union at Respondent's Charlotte, North Carolina, apparatus repair plant. On January 31, 1977, that petition was dismissed by the Board in *Westinghouse Electric Corporation,* 227 NLRB 1932 (1977). The Board held in that case that the union local at the Charlotte plant had engaged in multiunion bargaining with other union locals and that the employees in the local unit had been merged into a single multiplant unit. Thus the Union became and continues to be the exclusive representative of the employees in said multiplant unit described below, within the meaning of Section 9(a) of the Act.

> The single multiplant unit found by the Board to be appropriate in *Westinghouse Electric Corporation*, 227 NLRB 1932 (1977), embracing all those plants of the Employer in which the Union through its Conference Board has been recognized as the exclusive bargaining agent and which are covered by the national agreement, including all production and maintenance employees employed by the Respondent at its Apparatus Repair Plant in Charlotte, North Carolina, excluding at that plant all professional, technical, office/clerical employees, guards and supervisors as defined in the Act.

B. The request to bargain and respondent's refusal

On or about January 2, 1978, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all production and maintenance employees at the apparatus repair plant, Charlotte, North Carolina, a part of the appropriate multiplant unit. Commencing on or about January 2, 1978, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since January 2, 1978, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in Section III, above, occurring in connection with its operations described in Section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions Of Law

1. Westinghouse Electric Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Electrical, Radio and Machine Workers, AFL—CIO—CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All those plants of the Employer in which the Union through its Conference Board has been recognized as the ex-

clusive bargaining agent and which are covered by the national agreement, including all production and maintenance employees employed by the Respondent at its Apparatus Repair Plant in Charlotte, North Carolina, excluding at that plant all professional, technical, office/clerical employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The above-named labor organization has been and now is the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 2, 1978, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board

hereby orders that the Respondent, Westinghouse Electric Corporation, Charlotte, North Carolina, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Electrical, Radio and Machine Workers, AFL—CIO—CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All those plants of the Employer in which the Union through its Conference Board has been recognized as the exclusive bargaining agent and which are covered by the national agreement, including all production and maintenance employees employed by the Respondent at its Apparatus and Repair Plant in Charlotte, North Carolina, excluding at that plant all professional, technical, office/clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

(b) Post at its Charlotte, North Carolina, plant copies of the attached notice marked "Appendix."[4] Copies of said

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

notice, on forms provided by the Regional Director for Region 11, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the instant proceeding be, and it hereby is, remanded to the Regional Director for Region 11 for the sole purpose of holding a hearing before an Administrative Law Judge to determine whether or not the establishment of a second-shift operation is an unfair labor practice as alleged in the complaint.

Dated, Washington, D.C. September 29, 1978.

/s/ JOHN H. FANNING
John H. Fanning
Chairman

/s/ HOWARD JENKINS, JR.
Howard Jenkins, Jr.
Member

/s/ BETTY SOUTHARD MURPHY
Betty Southard Murphy
Member

National Labor Relations Board

(SEAL)

APPENDIX

Notice To Employees

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Electrical, Radio and Machine Workers, AFL—CIO—CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment. The bargaining unit is:

> All those plants of the Employer in which the Union through its Conference Board has been recognized as the exclusive bargaining agent and which are covered by the national agreement and including all production and maintenance employees employed by the Respondent at its Apparatus and Repair Plant in Charlotte, North Carolina, excluding at that plant all professional, technical, office/clerical employees, guards and supervisors as defined in the Act.

WESTINGHOUSE ELECTRIC CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U.S. Courthouse, Federal Building, 251 North Main Street—Room 447, Winston-Salem, North Carolina 27101, Telephone (919) 761-3212.

APPENDIX E

Supplemental Decision And Order

On September 29, 1978, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding wherein it found that Respondent Westinghouse Electric Corporation had violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit. The Board ordered that Respondent cease and desist therefrom and take certain affirmative action to remedy the unfair labor practices. The Board found, however, that a genuine issue of material fact existed as to the allegation of the complaint that Respondent violated Section 8(a)(5) of the Act by unilaterally establishing a second-shift operation and remanded that issue to the Regional Director for hearing before an Administrative Law Judge.

On December 5, 1978, the Board, *sua sponte,* issued a Notice To Show Cause why the Board's Order remanding the issue of whether Respondent violated Section 8(a)(5) of the Act by unilaterally establishing a second shift should not be vacated and the General Counsel's Motion for Summary Judgment should not be granted. Respondent and the Charging Party filed briefs in response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board has decided to vacate its Order remanding the aforementioned issue to the Regional Director for a hearing and to modify its original Decision and Order to the extent set forth below.

In paragraph 10 of the original consolidated complaint, the General Counsel alleged that Respondent and the Union

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[1] 238 NLRB No. 102.

are parties to a current national collective-bargaining agreement with a duration of 3 years from July 12, 1976, until July 16, 1979. The consolidated complaint also alleges the existence of a local supplement for the Charlotte facility dated July 20, 1976. In its answer to the allegations of paragraph 10, Respondent admitted that it and the Union are parties to a national collective-bargaining agreement effective July 10, 1976, and terminating July 16, 1979. Respondent denied, however, that the current national agreement covers employees in the unit described in paragraph 6 of the consolidated complaint and maintains that the Union is not the collective bargaining representative of employees in the described unit. Respondent also denies the existence of any local agreement or supplement covering the Charlotte facility, and specifically any of July 20, 1976. Finally, answering, arguendo, a finding that the current national agreement covers the Charlotte facility, Respondent asserts that the national agreement contains "clear and unambigous language conferring on the Respondent the absolute right to establish a second shift."

In remanding that part of the proceeding concerning the unilateral institution of a second shift the Board in its Decision and Order (sl. op., p. 6) noted that the exhibits submitted in support of the Motion for Summary Judgment do not contain a copy of an alleged local supplemental agreement dated July 20, 1976, covering the establishment of new shifts and changes in shift schedules at the Charlotte facility at the time in issue. (Exh. HH submitted in support of the motion contains copies of Local Supplements including Local Supplement IV, entitled "Hours of Work" and covers shift establishment and changes but it is dated June 25, 1975. The alleged unilateral change in shifts in issue occurred in February 1978.) Hence, the Board concluded an issue of fact existed as to Respondent's alleged unlawful unilateral action in establishing a second shift.

After issuance of its Decision and Order the Board's attention was directed to the record in the representation pro-

ceeding, Case 11—RD—247,[2] and specifically to exhibits contained in that record which include a copy of the 1976 Supplement to the national agreement (Co. Exh. 13). It appears that this 1976 Supplement by its express terms extends to 1979 the duration of local agreements such as Local Supplement IV referred to above, a part of Exhibit HH and contained in the exhibits in support of the Motion for Summary Judgment. Inasmuch as the local agreement expressly provides "New shifts and changes in existing shifts schedules will not be made effective without prior discussion with the Local," the Board concluded it appeared that only an issue of law and not of fact was presented by the allegation of a unilateral institution of a second shift and, accordingly, issued the Notice To Show Cause.

In response to the notice, Respondent raises three defenses. First, Respondent asserts that the General Counsel did not introduce any evidence in support of its allegation in paragraph 11(e) of the consolidated complaint that Respondent in fact established a second shift. Respondent claims that its general denial of this allegation in its answer puts this allegation in issue and that a hearing is necessary to resolve this factual dispute. Second, Respondent maintains, as it has from the outset of this case, that the current national collective-bargaining agreement between the Company and the Union is not applicable to the Charlotte bargaining unit. And third, Respondent argues that, even if the current national collective-bargaining agreement between the Company and the Union is applicable to the Charlotte unit, the "management rights" sections of that agreement gives Respondent the absolute contractual right to establish unilaterally a second shift. And Respondent maintains there is no local supplement applicable to the Charlotte unit which would vary the terms of the "management rights" section of the national agreement. In asserting than its general denial is

[2] As indicated in its Decision and Order, 238 NLRB No. 102, at fn. 1, the Board takes official notice of the record in the representation proceeding in Case 11—RD—247.

sufficient to put the establishment of a second shift in issue, Respondent ignores Exhibit JJ which is attached to the General Counsel's Motion for Summary Judgment. Exhibit JJ is a letter dated March 13, 1978, from Respondent's counsel to the Board agent setting forth the Company's position with respect to the charges and showing that Respondent did indeed establish a second shift at its Charlotte plant in February 1978. It is well settled that a general denial is insufficient to put in issue a fact established by an exhibit attached to a motion for summary judgment unless the respondent specifically controverts the contents of that exhibit.[3] Because Respondent herein failed to controvert the contents of the letter identified as Exhibit JJ, the establishment of the second shift is deemed admitted.

Nor do we find merit in Respondent's contention that the current national collective-bargaining agreement between the Company and the Union is not applicable to the Charlotte bargaining unit. As set forth in the original Decision and Order herein, Respondent's withdrawal of recognition of the Union at Charlotte and its refusal to apply the terms of the current national agreement to unit employees at the Charlotte facility is predicated on Respondent's claim that it entertains an "objective" and "reasonable" belief that the Union does not enjoy majority status among unit employees at Charlotte. Such belief is based on (1) filing of a decertification petition by unit employees on May 5, 1976, and (2) the subsequent lack of union activity within the Charlotte plant. However, as we held in our original Decision and Order, in light of the underlying representation case (11—RD—247),[4] wherein the Board dismissed the decertification petition and concluded that the Charlotte unit had merged with the existing multiplant unit, Respondent cannot now raise as a

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[3] See *The Boston Store,* 224 NLRB 505 (1976); *Schwartz Brothers, Inc. and District Records, Inc.,* 194 NLRB 150 (1971); and *Gooch Packing Company, Inc.,* 188 NLRB 890 (1971).

[4] Reported at 277 NLRB 1932 (1977).

defense of the allegations of the complaint its belief that the Union no longer enjoys majority status among unit employees at Charlotte. In so doing, Respondent is once again seeking to relitigate issues that were decided in the representation proceeding. It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[5]

Finally, we reject Respondent's contention that, even if the current national agreement is held applicable to the Charlotte unit, the national agreement by its terms permits the institution of new shift or shift terms without notice to or consultation with the Union. In this connection, Respondent relies on Section III of the national agreement which provides "Management shall have the freedom of action necessary to discharge its responsibility for the successful operation of the Company." Section III further provides that "this responsibility includes, among other things, the determination of the number and location of its plants, the selection of those with whom it will do business, and the determination of the products to be manufactured and the production schedules."

Contrary to the Respondent, and as discussed herein, *supra,* the record in the instant proceeding contains a copy of a local supplemental agreement (Local Supplement IV) concerning the establishment of new shifts and changes in shift schedules at Charlotte (as part of Exh. HH) as well as a copy of the 1976 supplement to the national agreement (Co. Exh. 13) which by its terms extends all local agreements to 1979. Inasmuch as the relevant local agreement expressly requires notice and consultation with the Union prior to the establishment of "[n]ew shifts and changes in existing shifts,"

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[5] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.,* 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Respondents' reliance on the general language of the management rights section of the national agreement is misplaced.

Accordingly, we hereby grant Summary Judgment and find that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally establishing a second-shift operation at its Charlotte plant without notice to or consultation with the Union.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Westinghouse Electric Corporation, Charlotte, North Carolina, its agents, successors, and assigns, shall:

1. Cease and desist from:

2. Unilaterally instituting a second-shift operation without notice to or consultation with the Union.

(b) Refusing to honor and apply the terms and conditions of the national collective-bargaining agreement between Respondent and the Union and the terms and conditions of local supplementary agreements between Respondent and the Union to Respondent's Charlotte, North Carolina, facility.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) If requested to do so by the Union, restore the one-shift operation at the Charlotte, North Carolina, plant as it existed prior to February 20, 1978, and make whole any of the unit employees for any loss of pay or other compensation they may have suffered by reason of the unilateral institution of the second shift in the manner set forth in *F. W.*

Woolworth Company, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation,* 231 NLRB (1977).[6]

(b) Upon request, honor and apply the terms and conditions of the national collective-bargaining agreement between Respondent and the Union, and local supplements between the Respondent and the Union, to Respondent's Charlotte, North Carolina, facility.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Charlotte, North Carolina, facility copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by the Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[6] See, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. February 13, 1979

/s/ JOHN H. FANNING,
John H. Fanning,
Chairman

/s/ HOWARD JENKINS, JR.
Howard Jenkins, Jr.,
Member

/s/ BETTY SOUTHARD MURPHY
Betty Southard Murphy,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

Notice To Employees

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT unilaterally institute a second-shift operation without notice to or consultation with the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC.

WE WILL NOT refuse to honor and apply the terms and conditions of the national collective-bargaining agreement and the local supplements in effect between us and the Union to our Charlotte, North Carolina, facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, or any other labor organization, to bargain collectively through representatives of their own choosing, to

engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL, if requested to do so by the Union, restore the one-shift operation at the Charlotte, North Carolina, plant as it existed prior to February 20, 1978, and make whole any unit employee for any loss of pay or other compensation they may have suffered by reason of the unilateral institution of the second shift with interest.

WE WILL, upon request, honor and apply the terms and conditions of the national collective-bargaining agreement and the local supplements between Westinghouse Electric Corporation and the above named Union to our Charlotte, North Carolina, facility.

WESTINGHOUSE ELECTRIC CORPORATION
(Employer)

Dated _____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U.S. Courthouse, Federal Building, 251 North Main Street—Room 447, Winston-Salem, North Carolina 27101, Telephone (919) 761-3212.

APPENDIX F

29 U.S.C.§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizaions, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice fo an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

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(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

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§159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to

protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals of labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section.

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with Section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a runoff shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

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Supreme Court, U. S.
FILED
SEP 19 1980
MICHAEL RODAK, JR., CLERK

No. 80-224

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTINGHOUSE ELECTRIC CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
AND
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR RESPONDENT INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC IN OPPOSITION TO PETITION

WINN NEWMAN
JAMES G. MAURO, JR.
1126 16th Street, N.W.
Washington, D.C. 20036

Counsel for Respondent International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC,

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

(1) Should this Court grant *certiorari* where Petitioner has failed to show that the Court of Appeals' enforcement of the Board's decision is in conflict with the ruling of any other circuit court, where no constitutional question is presented, and where the Board's underlying unit determination is based upon substantial uncontraverted evidence and is fully consistent with applicable judicial and Board precedent?

PARTIES TO THIS PROCEEDING

In addition to Westinghouse Electric Corporation, Petitioner, and Respondents National Labor Relations Board and International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, the only other party to the underlying proceedings was the United Electrical, Radio and Machine Workers of America (UE), which appeared as *amicus curiae* in the Court below.

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BRIEF FOR RESPONDENT INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC IN OPPOSITION TO PETITION

OPINIONS BELOW

Petitioner's Appendix (A)-(E) sets forth the decisions of the United States Court of Appeals for the Fourth Circuit and the National Labor Relations Board which are the subjects of this proceeding.

JURISDICTION

The jurisdictional requisites of this Court have been adequately set out in the Petition.

STATUTES INVOLVED

Petitioner's Appendix (F) reproduces the pertinent sections of the National Labor Relations Act, 29 U.S.C. §158(a) (1) and (5).

COUNTER STATEMENT OF THE CASE

INTRODUCTION

Petitioner asks this Court to grant certiorari to review the *Per Curiam* decision of the Court of Appeals for the Fourth Circuit which granted enforcement of the Decision and Order of the National Labor Relations Board in 238 NLRB No. 102 (September 29, 1978), and its Supplemental Decision and Order in 240 NLRB No. 106 (February 13, 1979). In those decisions, the Board found Westinghouse to have violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) and (5), by withdrawing recognition from Respondent, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (IUE), and by failing to honor and apply the terms of the National Agreement between the IUE and Westinghouse and the Local Supplement applicable to the Westinghouse Charlotte, North Carolina Apparatus Repair Plant.

The basis for Petitioner's suggestion that the Court of Appeals should be reversed and certiorari be granted in this case is the factually mistaken assumption that the Board neglected to find that the IUE's historic multi-plant bargain-unit of Westinghouse employees was a "unit appropriate for collective bargaining" under Section 9(b) of the NLRA,[1] the legally erroneous assertion

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[1] Insistence upon this argument flies squarely in the face of the Board's detailed repeated reiteration of its reasoning for finding that the IUE represented a single multi-plant unit under Section 9(b) of the Act, which encompassed the employees of the Charlotte

that in reviewing the Board's appropriate unit finding below the Court of Appeals has not considered the right of employees to refrain from engaging in Section 7 activity, and that this Court go beyond the limitations of the present case and conduct a "long overdue" plenary review of the Board's administration of the Act and the policies which have followed the landmark ruling in *Pittsburgh Plate Glass Company* v. *NLRB,* 313 U.S. 146 (1941).

On the contrary, as the Court of Appeals summarily found,[2] the Board's decisions below rested upon the substantial evidence adduced in this particular case, and well-established legal precedent which is entirely consistent with prior decisions of this Court and those of various Circuit courts. As the Petition raises no substantial constitutional, statutory or procedural questions, and involves uniquely limited factual circumstances, it should be denied.

(1) The History Of The IUE-Westinghouse National Collective Bargaining Relationship

The crux of Petitioner's position is a challenge to the Board's findings that the appropriate collective bargaining unit of IUE-Westinghouse employees is a

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Apparatus Repair Plant, in *Westinghouse Electric Corporation and IUE,* 238 NLRB No. 102 (Petitioner's Appendix D, pp. 18(a)-19(a) and particularly p. 23(a)-24(a)); 240 NLRB No. 106 (Petitioner's Appendix E, pp. 32(a)-33(a)). These challenged decisions each cited and readopted the Board's detailed explanation for finding the IUE's single multi-plant unit of Westinghouse employees was an appropriate unit for collective bargaining in *Westinghouse Electric Corporation and Robert Hurtt and IUE,* 227 NLRB 1932 (1977), (Petitioner's Appendix C, pp. 7(a)-14(a)).

[2] The Court of Appeal's *Per Curiam* enforcement of the Board's Orders is in Petitioner's Appendix A, 1(a)-3(a); and the denial of Westinghouse's Petition for Rehearing *en banc,* is reproduced in Petitioner's Appendix B, p. 4(a)-5(a).

single multi-plant unit. The Board's decision, reaffirming the IUE's historic, single multi-plant bargaining unit, was the result of extensive evidentiary hearings arising from a decertification petition filed by a handful of employees at the Westinghouse Charlotte Apparatus Repair Plant.[3]

Since 1950, the IUE has had a National Agreement with Westinghouse broadly governing the wages, hours and conditions of employment of those employed in a growing number of Westinghouse facilities across the United States (Joint Appendix B 180-184, submitted below). This National Agreement has been periodically supplemented in National negotiations, has been, to a limited extent, locally supplemented at many IUE-Westinghouse plants[4] and has remained continuously in effect since 1950. (A.442)

The IUE-Westinghouse National Agreement not only provides for the automatic inclusion of bargaining units subsequently certified by the Board,[5] but sets the

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[3] *Westinghouse Electric Corp. and IUE,* 227 NLRB 1932 (1977) (Petitioner's Appendix C).

[4] Not all IUE locations negotiate Local Supplements (A.482) which generally deal with work schedules, reclassification of specific jobs, lay-off and recall procedures, overtime distribution, details of the grievance procedure, seniority units, etc. (B. 85-96; A.228-233). No Local supplement may conflict with the provisions of the National Agreement (A.441), and they are all subject to approval of the International Union's IUE-Westinghouse Conference Board. Once included in the National Agreement, the parties have agreed that a Local cannot terminate or remove itself from the coverage of that Agreement.

[5] See, B.207, 76, 142. Westinghouse's contention that the inclusion of new units is not automatic was explicitly rejected by the Board in *Westinghouse Electric Corp. and IUE, 224 NLRB No. 123 (1970),* and the Court of Appeals for the Fourth Circuit in a *Per Curiam* opinion in *NLRB* v. *Westinghouse Electric Corp.,* Docket No. 77-1306 (4th Cir. March 13, 1978).

basic terms and conditions of employment for the more than 20,000 IUE-represented workers.

The National Agreement establishes general wage increases and wage policies, national negotiating procedures, the grievance and arbitration procedure, check-off of union dues and union security, lock out protections and the right of IUE Locals to strike upon approval of the IUE-Westinghouse Conference Board, basic work week, overtime premiums, holidays and vacations, role of seniority in lay-off, recall and upgrading, leaves of absence, and the procedures for modifying or terminating the National Agreement and its Local Supplements. (B.79-110). The National Agreement incorporates a pension and insurance agreement which establishes uniform benefits and all other aspects of the pension and insurance programs. (B.127-141).

Since 1950, the IUE-Westinghouse National Agreement has been centrally negotiated and administered by the IUE-Westinghouse Conference Board, which consists of all IUE-represented Westinghouse locations and is staffed by full-time elected officers and employees. The central role of the Conference Board and its Negotiating Committee is not only contractually recognized, but the Conference Board meets with the corresponding Westinghouse Corporate industrial relations staff on a day-to-day basis to administer the National Agreement and Local Supplements. Between 1950 and 1976, the Conference Board processed approximately 18,000 grievances (A. 481) and arbitrated hundreds of others (A. 435) on behalf of all locations represented by the IUE. The Conference Board has the ultimate respon-

sibility for the negotiation of the National Agreement and the Local Supplements.[6]

Westinghouse's control of labor relations is equally centralized, and all phases of negotiations, contract administration, and pension and insurance administration is standardized and directed from Corporate headquarters in Pittsburgh. (A.131, 191, 231, 337-338, 463, 477 and 590).

Since 1950, the IUE's multi-plant unit has grown from twenty-two plants to more than forty, although some locations have been dropped because of closings, or sale,[7] and reference to these units was removed from the National Agreement. Over the past thirty years, the IUE has never agreed to the exclusion of any IUE-represented Westinghouse location from the National Agreement (A.464), and no unit has been eliminated by decertification or voluntary withdrawal. (A. 210-212, 464). During this period, the Board has routinely ordered elections at Westinghouse Plants not represented by the IUE, and, when certified, these locations have been included in the recognition provisions of the National Agreement and incorporated into the scope of the IUE's national bargaining and contract administration.[8]

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[6] Conference Board representatives led the 1975 negotiations which led to the Local Supplement covering the Charlotte location (A.133). Typically, Westinghouse was represented in these meetings by a Corporate Labor Relations representative from Pittsburgh. (B.122).

[7] See, for example *White-Westinghouse Corp., Division of White Consolidated Industries Inc.* and *IUE,* 220 NLRB 667 (1977); *enf'd sub. nom. IUE* v. *NLRB,* 604 F.2d 639 (D.C. Cir. 1979).

[8] Petitioner's reference (P. 5-6) to the Board's prior rejection of the IUE's multi-plant unit is singularly incorrect. The 1954 petition sought an election in plants represented both by IUE and by UE.

(2) The Certification Of The IUE At The Charlotte Apparatus Repair Plant And Westinghouse's Withdrawal Of Recognition And Repudiation Of The National Agreement And Local Supplement

After the IUE was chosen in a Board-sponsored election[9] as the exclusive collective bargaining representative of the production and maintenance employees at the Charlotte Apparatus Repair Plant, both parties agreed to include the Charlotte location within the IUE National Agreement.[10] Subsequently, IUE Local 186 was established by the International Union for Charlotte employees, and a Local Supplement was negotiated pertaining to specific conditions at the Charlotte Plant. This Local Supplement has never been terminated and has remained in effect to this date.[11]

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[9] At several points, the Petition claims that the Charlotte employees were told ". . .they could decertify the union later if they wanted to" (Petition, p. 7, footnote 3; p. 23-24, fn. 15.) The Board rejected this contention in finding that the National Agreement was widely distributed to employees during the campaign, and that coverage of Charlotte employees under that Agreement was a key element in the organizational drive; and further found that IUE organizers had stressed the *inclusion* of Charlotte workers in the multi-plant unit as a source of protection and strength. Moreover, the employee testimony Petitioner relies upon in this regard was extremely ambiguous, as employees were uncertain as to whether their "impressions" that they could "get-out" referred to union membership and check-offs or decertification. (A. 595-596, 602).

[10] Charlotte remained in the IUE National Agreement after the 1976 negotiations. The Company agreed to include it under the scope of the 1976-1979 Agreement even after the decertification petition was filed, thereby contractually agreeing to recognize the IUE. Moreover, in the 1976 National negotiations, a special wage adjustment ranging from 5¢ to 50¢ per hour was negotiated to cover 36 of the 41 employees at the Charlotte Plant. (A-161; B. 939).

[11] The Petition claims that the IUE was "dormant" at the Charlotte Plant during 1977. (Petition, p. 9-10, fn 5) and, again,

When Westinghouse received a letter dated December 20, 1977 from the International Union filing five grievances and submitting dues deduction authorization cards, the Company informed the Union that it would no longer recognize the IUE. (A.38, 51-52.) Since that time, Westinghouse has refused to formally bargain with the IUE and its Local 186, and has refused to honor the terms and conditions of the IUE-National Agreement or the Local Supplement thereto at the Charlotte Apparatus Repair Plant. The unfair labor practice proceedings which are before this Court were initiated as a result of Westinghouse's actions.

(3) The Findings Of The National Labor Relations Board In The Cases Enforced By The Fourth Circuit.

In its Decisions and Orders in *Westinghouse Electric Corp., and IUE,* 238 NLRB #102 and 240 NLRB #106, The Board found that Westinghouse violated its duty to bargain with the IUE by committing multiple violations of Sections 8(a)(1) and (5) of the Act beginning in January, 1978 including: (1) refusing to comply with and honor various terms of the existing IUE-Westinghouse National Agreement and the Local Supplement applicable to the Charlotte Apparatus Repair Plant (A. 118); (2) withdrawing recognition from the IUE in January, 1978 (A.94); and (3) unilaterally in-

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misstates the record. Evidence submitted by Westinghouse in the Court below showed that: (1) the Union met with Local management in February, 1977 and received a copy of the Charlotte seniority list; (2) in March, 1977 an International representative met with the Charlotte Plant Manager and succeeded in reversing the discharge of a Westinghouse employee; and, (3) in July, 1977 another grievance was raised over a three-day suspension, and a meeting with the Plant Manager again occurred. (A. 39-42).

stituting a second shift operation at the Charlotte Plant without notification to or bargining with the IUE. (A.118) In support of these conclusions, the Board further found that Westinghouse and the IUE had, on July 20, 1976, renegotiated the National Agreement which had been in effect between the parties since 1950, and that the 1976 Supplement extended without interruption the Local Supplement negotiated for the Charlotte Plant in 1975. Consequently, the Company's admitted refusals to accept grievances filed by the Union, refusals to honor dues check-off authorizations executed by Charlotte employees, and unilateral establishment of a second shift operation, were all held to be violations of applicable collective-bargaining Agreements and Section 8(a)(1) and (5) of the Act. Moreover, the Board found that Westinghouse had illegally withdrawn recognition from the IUE in January, 1978, continued to refuse to recognize and bargain with the Union thereafter, even though the IUE was and has continued to be the exclusive collective-bargaining representative of a single multi-plant unit of all IUE-represented Westinghouse locations covered by the National Agreement, including the Charlotte Apparatus Repair Plant.

The Petition asks this Court to grant review of the enforcement of these Board orders by the Court of Appeals for the Fourth Circuit.

REASONS FOR DENYING THE WRIT

This Court has frequently emphasized that the Board has broad discretion in determining whether a unit is appropriate for collective-bargaining purposes under Section 9(b) of the Act. In this case, the Court of Appeals correctly found that the Board's decision in the unfair labor practice proceeding rested upon the

substantial weight of virtually uncontested evidence, and that the Board's underlying conclusion that the Charlotte location had been absorbed or merged into the IUE's historic single multi-plant bargaining unit was supported by the record and consistent Board and judicial precedent.

As the Petition fails to specify any appropriate rationale for this Court's review, given the Board's sound exercise of its discretion as well as the consistency of the Court of Appeals' enforcement with prior Board and judicial holdings, and fails to justify extraordinary exercise of this Court's plenary review of the Board's 40 year long practice of sanctioning multi-plant units, it should be denied.

POINT I

The Board Has Correctly Exercised Its Broad Discretion In Determining That The Unit Appropriate For Collective-Bargaining Is A Single Multi-Plant Unit

This Court has frequently emphasized the broad discretion Congress gave the Board in making bargaining unit determinations:

> "The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed. While we do not say that a determination of a unit of representation cannot be so unreasonable and arbitrary as to exceed the Board's power, we are clear that the deci-

> sion in question does not do so. That settled, our power is at an end."

Packard Motor Car Co. v. *NLRB,* 330 U.S. 485, 491-92 (1947); *Accord, South Prairie Construction Co.* v. *Local 627, IUOE,* 425 U.S. 800, 804, 807 (1976). In deferring to the Board's expertise in its unit determinations, the Court has further held that,

> ". . . the unit selected must be one to effectuate the policy of the Act, the policy of efficient collective bargaining"

Pittsburgh Plate Glass Co. v. *NLRB,* 313 U.S. 146, 165 (1941); and has required the Board to articulate substantial reasons for its unit determinations. *NLRB* v. *Metropolitan Life Insurance Co.,* 380 U.S. 438 (1965); *NLRB* v. *Purity Food Stores, Inc.,* 376 F.2d 497, 501 (1st Cir. 1967); *cert. den'd* 389 U.S. 959 (1967), Cf. *NLRB* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 349 (1953).

In the present case the Board has clearly, deliberately and forcefully elaborated upon the factual and legal basis for its finding that the Charlotte Plant was merged into the IUE's historic, single multi-plant bargaining unit of Westinghouse employees, first in the underlying representation case and then again in the unfair labor practice proceeding.

In determining that the IUE represents a single multi-plant bargaining unit, the Board applied criteria established by this Court almost 40 years ago in *Pittsburgh Plate Glass Co.* v. *NLRB, supra.* and, in similar factual circumstances, when the Board has found the necessary facts to justify a multi-plant or multi-location bargaining unit determination, these criteria have been solidly reaffirmed by this Court in refusing to review the Board's unit findings. Cf. *Libbey Owens-Ford Co.* v.

NLRB, 495 F.2d 1195 (3rd Cir. 1974); *cert. den'd* 417 U.S. 998 (1974); *Primrose Super Market of Salem, Inc.,* v. *NLRB,* 353 F.2d 675 (1st Cir. 1974); *cert. den'd* 383 U.S. 830 (1965). As the Board's initial unit determination was fully litigated in the representation proceeding, and was consistent with applicable precedent and fully supported by the facts, the Court of Appeals was correct in deferring to it and in enforcing the Board's unfair labor practice findings.

Implicit in each unit determination made by the Board is a balancing of Section 7 rights of individual employees with the primary policy of encouraging more efficient collective bargaining. *Carey* v. *Westinghouse Electric Corp.,* 375 U.S. 261, 268-269 (1964). From the Board's earliest multi-plant finding in *Pittsburgh Plate Glass Co.* v. *NLRB, supra.* at 150, the desires of some smaller groups of employees were overridden to carry out the Board's legislatively-imposed duty to foster stability in labor relations. The Board's multi-plant determinations certainly have no more adverse impact upon Section 7 rights of employees to refrain from engaging in union activity by filing a decertification petition[12] than the approval of multi-employer units (Cf. *NLRB* v. *Strong,* 393 U.S. 357 (1968)), the denial of craft severance units,[13] the Board's refusal to hold department elections in unorganized plants, or the accre-

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[12] The perversity of Westinghouse's pious and disingenuous concern for individual rights was demonstrated in this case by the fact that Petitioner only refused to recognize the IUE after it was faced with substantial growth of support for the Union through sharp increase in Section 7 activity and attempts to enforce an existing collective bargaining Agreement.

[13] See, *Mallinckrodt Chemical Works,* 162 NLRB 387 (1966).

tion of groups of employees to larger, pre-existing units without elections, *Westinghouse Electric Corp.* v. *NLRB,* 440 F.2d 7, 11 (2nd Cir. 1971); *cert. den'd* 404 U.S. 853 (1971). If one adopts the Petitioner's view, as we cannot, in all of these areas of Board action Section 7 rights of employees are "extinguished" by unit determinations. Consequently, the "plenary review" Petitioner seeks on behalf of a handful of Charlotte employees amounts to no less than a demand for sweeping judicial reordering of the Board's well-settled policies, a nullification of the careful balance which the Board has struck through hundreds of decisions and years of this Court's guidance, to the ultimate detriment of the country's labor stability and the rights of millions of American workers who benefit from sound, stabilized bargaining relationships.

The Court of Appeals wisely rejected this proposition and, for these same reasons, we submit that this Court should deny Westinghouse's self-interested attempt to reverse forty years of administrative and judicial precedent, and nullify its thirty years of national collective bargaining with the IUE.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WINN NEWMAN
JAMES G. MAURO, JR.
1126 16th Street, N.W.
Washington D.C. 20036

Counsel for Respondent
INTERNATIONAL UNION OF
ELECTRICAL, RADIO AND
MACHINE WORKERS,
AFL-CIO-CLC

Dated: September 15, 1980

Supreme Court, U. S.
FILED
OCT 9 1980
MICHAEL RODAK, JR., CLERK

No. 80-224

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. McCREE, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel
JOHN E. HIGGINS, Jr.
Deputy General Counsel
ROBERT E. ALLEN
Acting Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
LINDA SHER
Assistant General Counsel
LAWRENCE E. BLATNIK
Attorney
National Labor Relations Board
Washington, D.C. 20570

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether the Board properly found that the employees at petitioner's Charlotte, North Carolina plant had been merged into an existing multiplant unit of petitioner's Union-represented employees, and that therefore petitioner violated Sections 8(a)(5) and (1) of the Act by refusing to bargain with the Union [1] as the Charlotte employees' representative on the ground that the Board previously had erred in refusing to conduct a decertification election restricted to the Charlotte plant.

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[1] International Union of Electrical, Radio and Machine Workers (hereinafter the "Union").

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–3a) is not reported. The decision and order of the Board (Pet. App. 15a–28a) are reported at 238 N.L.R.B. No. 102. The Board's supplemental decision and order (Pet. App. 29a–37a) are reported at 240 N.L.R.B. No. 106. The Board's decision and order in the underlying representation proceeding (Pet. App. 6a–14a) are reported at 227 N.L.R.B. 1932.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1980. A timely petition for rehearing and suggestion for rehearing en banc was denied on May 19, 1980. The petition for a writ of certiorari was filed on August 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set out in the petition (Pet. App. 38–41).

STATEMENT

1. Petitioner operates facilities throughout the country, including an apparatus repair plant located in Charlotte, North Carolina (Pet. App. 20a). Since 1950 the Union has, through Board certifications issued to it and its constituent locals on a plant-by-plant basis, become the bargaining representative for petitioner's employees at various plants, including the one in Charlotte (Pet. App. 7a). The Union has also, since 1950, negotiated with petitioner a national collective bargaining agreement (and a series of supplemental agreements extending and modifying the national agreement) applicable to all employees represented by the Union at the various plants (Pet. App. 7a–8a).[2] The national agree-

[2] The national agreement covers in detail such substantive terms as general wage increases, cost-of-living adjustments, overtime pay, night-time adjustments, holidays, vacations, sick and personal days, leaves of absence, terminations, procedures for increasing and decreasing the workforce, a four-stage

(Continued)

ment provides for the negotiation of local supplemental agreements to cover bargaining issues local in nature and to implement certain of the general provisions of the national agreement. However, local supplements may not conflict with the national agreement and are subject to review by a Conference Board composed of representatives from the Union's various locals (Pet App. 8a–9a, 12a). The national agreement specifies how local supplements may be modified and provides for the continuation of all outstanding local agreements not voided by the national agreement upon each extension of the term of the national agreement (Pet. App. 31a, 33a; A. 248; B. 109, 167). The national agreement also prescribes a procedure by which local bargaining units certified after its ratification may be included in and covered by its terms (Pet. App. 9a–10a).[3] Invariably, newly certified local bargaining units have taken advantage of this provision and have been brought under the national agreement's coverage (Pet. App. 12a).[4]

In early 1975, the Union initiated an organizational campaign at petitioner's Charlotte plant. Coverage by the national agreement was a key element of the campaign, and copies of the agreement were widely distributed among the Charlotte employees (Pet. App. 13a). On March 21, 1975, pursuant to a Board-conducted election in a unit stipulated

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grievance procedure, arbitration, hours of work, strike and walkout provisions, union shop provisions, and general seniority rules (Pet. App. 9a; B. 23–47). ("A." references are to the joint appendix in the court of appeals. "B." references are to the exhibit volume of the joint appendix.)

[3] The relevant provision states (Pet. App. 9a–10a): "Any units for which the Union or any of its Locals shall be lawfully certified by the National Labor Relations Board as the exclusive bargaining representative, shall, upon assent in writing to this Agreement by such representative, be included in and covered by this Agreement as of the date of certification, except that either party may withhold the application of those portions of this Agreement considered inapplicable to such units by giving written notice to the other party within thirty (30) days of such representatives' assent."

[4] None of these units has ever been subsequently excluded from the agreement's coverage for any reason other than petitioner's sale or discontinuance of operations at a particular plant site. (A. 209–211, 399–400, 464–465, 482).

as appropriate by the parties, the Union was certified as bargaining agent for all production and maintenance employees at the Charlotte plant (Pet. App. 7a, 21a). Four days later, the chairman and secretary of the Union's Conference Board assented to application of the national agreement to the employees in the Charlotte unit retroactive to the date of certification. By letter dated April 2, 1975, petitioner acknowledged the Union's assent (Pet. App. 7a, 21a).[5] On July 20, 1976, petitioner and the Union executed a supplemental agreement continuing until July 16, 1979 the national agreement as modified (Pet. App. 21a), and expressly providing that all local supplements previously negotiated would continue in full force and effect until that date (Pet. App. 33a; B. 109, 167).[6]

On May 5, 1976, an employee at petitioner's Charlotte plant filed a petition with the Board seeking decertification of the Union's local as the representative of the Charlotte employees (Pet. App. 7a, 22a). Following a hearing on the petition, the case was transferred from the hearing officer to the Board for decision (Pet. App. 6a). On January 31, 1977, the Board issued a decision and order dismissing the petition on the ground that it sought decertification in a unit which was inappropriate in that it was "not coextensive with the currently recognized and established bargaining unit" (Pet. App. 14a). The Board based its decision on its findings that there exists "a controlling history of multiplant bargaining resulting in the establishment of a single multiplant unit embracing all those plants of [petitioner] in which the Union through its Conference Board has been rec-

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[5] Subsequently, local supplements applicable to the Charlotte plant were negotiated covering such matters as wage rate progressions for new employees, shift hours, the composition of the local bargaining committee, the recognized bargaining unit, and procedures for implementing the national agreement's provisions on overtime, grievances, seniority and hours scheduled at the local plant (Pet. App. 10a; B. 1-2).

[6] In addition, the appendix to the national agreement was amended to include the Charlotte plant in the list of plants covered by the agreement (B. 170).

ognized as the exclusive bargaining agent" (Pet. App. 13a), and that the Union's local at the Charlotte plant had not "retained a sufficiently separate, independent bargaining position from the other locals comprising the Conference Board in matters of collective bargaining for the employees at the Charlotte [plant] to be considered a separate unit." (Pet. App. 11a.)[7] While recognizing that as of the date on which the decertification petition was filed the Charlotte unit had been certified only 14 months, the Board concluded that this fact did not preclude a finding of merger (Pet. App. 13a):

> At the hearing, there was uncontradicted evidence that copies of the national agreement were widely distributed prior to the representation election and that the coverage of the Charlotte employees was a key element of the representation campaign. There is no evidence that the Charlotte unit resisted in any way its amalgamation with the other groups [of] employees. While *General Electric Company,* [180 N.L. R.B. 1094 (1970),] did not indicate the length of the bargaining history of the individual unit there involved, other Board decisions have found that merg-

[7] The Board further explained (Pet. App. 12a): "[I]t is clear that the Westinghouse Conference Board is the preeminent collective-bargaining agent for all employees represented by the Union at Westinghouse. Each local is represented on the board, but all decisions are rendered collectively. The record reveals that it is the Union's officers and not local agents who make the decision whether to include newly certified local units and that the decision has uniformly been in favor of adding newly certified units. The national agreement itself states that no local supplements may conflict with it and that the agreement covers all company-wide terms. It is evident that the parties also may place in the agreement terms that vary in their application to individual plants. For example, in the 1976–79 national agreement, a term was added providing for a special skills increase that varied greatly in its application to different plants. It therefore is evident that the national agreement is not limited in the scope of its application, and [may] contain terms both national in scope and those of only local consequence. Such an agreement [is] not 'merely a basic agreement for convenience in bargaining for whatever local units may be represented by the Union.' *Radio Corporation of America,* 121 NLRB 633, 644 (1958)."

ers of separate bargaining units have occurred as a result of multiplant agreements in time-spans of little more than a year. *Gould-National Batteries, Inc.*, 150 NLRB 418 (1964); *Owens-Illinois Glass Company*, 108 NLRB 947 (1954). We are therefore of the opinion that the employees of the Charlotte unit had sufficient notice that the unit's inclusion within the national agreement would entail a merger with a multiplant unit.[8]

2. In January and February of 1978, the Union filed unfair labor practices charges alleging that following the dismissal of the certification petition, petitioner violated Sections 8(a)(5)and (1) of the National Labor Relations Act by refusing to bargain with the Union as the representative of the Charlotte employees and by establishing unilaterally a second-shift operation among unit employees at the Charlotte plant (Pet. App. 15a–16a).[9] A complaint issued, and on September 29, 1978 the Board, finding that petitioner's refusal to bargain violated Sections 8(a)(5) and (1), granted summary judgment to the Union (Pet. App. 17a)[10] and issued a bargaining order (Pet. App. 24a–26a). On February 13, 1979, the Board issued a supplemental decision and order, finding that petitioner violated Sections 8(a)(5) and (1) by establishing a second-shift operation at the Charlotte plant without notice to or consultation with the Union (Pet. App. 33a–34a), and directing petitioner to restore the former

[8] The Board also found (Pet. App. 12a–13a) that neither the fact that the national agreement referred to plant-level employee organizations as "units" nor the agreement's general provision for local supplements was inconsistent with a finding of multiplant bargaining. See *Atlantic Richfield Co.*, 208 N.L.R.B. 142, 144 (1974); *General Electric Co.*, 180 N.L.R.B. at 1095 n.6.

[9] One of the local supplements applicable to the Charlotte plant, continued in force by the 1976–1979 extension of the national agreement, provides in pertinent part: "New shifts and changes in existing shift schedules will not be made effective without prior discussion with the Local" (B. 13).

[10] In its decision, the Board also found (Pet. App. 17a) that a material issue of fact existed with respect to the allegation that petitioner violated Sections 8(a)(5) of the Act by establishing unilaterally a second-shift operation, and therefore remanded that issue for a hearing.

shift schedule upon request, to reimburse employees for any losses suffered, and to honor and apply the terms of the national agreement and applicable local supplements (Pet. App. 34a–35a).

3. In a per curiam opinion, the court of appeals affirmed the Board's finding that the employees at petitioner's Charlotte plant had been merged into a single multiplant unit, rejected petitioner's assertion that it was improper for the Board to refuse to conduct a decertification election restricted to the Charlotte unit, and accordingly enforced the Board's order (Pet. App. 1a–3a).

ARGUMENT

Petitioner defends its refusal to bargain by urging that the Board improperly refused to hold a decertification election restricted to the unit employees at its Charlotte plant. There is no merit to that contention. In refusing to hold the certification election, the Board applied established principles of law to a unique set of facts. The decision of the court of appeals upholding the Board is consistent with the decisions of this Court and does not conflict with any decision in another circuit. Further review, therefore, is unwarranted.

1. The Board has for a quarter-century applied the following rule in determining whether to direct a decertification election (*Brom Machine & Foundry Co.* v. *NLRB*, 569 F. 2d 1042, 1043 (8th Cir. 1978), quoting with approval, *Continental Can Co.*, 217 N.L.R.B. 316, 317 (1975)):

> [I]n decertification cases the appropriate unit in which to conduct an election is the certified *or* contract unit. If the certified unit has been changed by contract, the Board relies upon the unit recognized by collective bargaining and on that basis holds an election to determine whether the employees wish to continue being represented.

Accord, *Campbell Soup Co.*, 111 N.L.R.B. 234, 235 (1955). It also is well settled that "parties to a collective-bargaining

relationship may, by contract, bargaining history, and course of conduct, merge existing certified units into multiplant appropriate units." By such merger, the separate identity of each component unit is lost and a single larger bargaining entity is established. *White-Westinghouse Corp.*, 229 N.L.R.B. 667, 672 (1977), enforced *sub. nom. I.U.E.* v. *NLRB*, 604 F. 2d 689 (D.C. Cir. 1979). Accord: *General Electric Co.*, 180 N.L.R.B. 1094, 1095 (1970); *Gould-National Batteries, Inc.*, 150 N.L.R.B. 418, 420, & n. 8 (1964). Therefore, when considering a decertification petition filed by employees in a multiplant unit formed by such a merger, the Board follows the rule that where "a separate unit covered by a Board certification [has] by an effective bargaining history be[en] merged into a broader unit * * * only the broader historical unit is appropriate for decertification purposes." *Gould-National Batteries, Inc., supra*, 150 N.L.R.B. at 420, and cases cited therein.

2. Petitioner is misdirected in challenging the merger finding on the basis that the Board did not find the multiplant unit "appropriate" for bargaining (Pet. 2, 12–15, 17 n. 10, 18, 20–21). True, the Board did not, in its decision, directly address such customary indicia of appropriateness as proximity of plants, integration of functions, and common management. Instead, it found the parties' bargaining history dispositive—by negotiating a succession of multiplant contracts over 25 years the parties had created a strong "community of interest" among employees who had come to share a broad range of contractually defined terms and conditions of employment negotiated on a group basis (Pet. App. 8a–14a). See *White-Westinghouse Corp., supra*, 229 N.L.R.B. at 674 ("[a]ny prior differences, including geographical separation and lack of interchange of employees—matters sometimes relevant in determining *ab initio* unit appropriateness—are rendered considerably less significant by this common history"); *General Electric Co., supra*, 180 N.L.R.B. at 1095 n.6 ("[w]e are * * * not disturbed by the lumping together of several groups of employees with different occupations for the reason that the lengthy

bargaining history * * * shows that in fact the present grouping is a basis for collective bargaining and that whatever separate community of interest * * * may have existed prior to this history of bargaining is today of little importance"). Thus, petitioner's reliance (Pet. 21) on factors such as the lack of geographical, functional and divisional integration of the unit employees misses the point,[11] for in the "merger" situation bargaining history may properly be found to outweigh other indicia of appropriateness.[12]

3. Nor is there merit to petitioner's contention (Pet. 3, 15, 17–23) that the Board's decision deprived the Charlotte employees of their Section 7 right to refrain from union activity. The employees were given an opportunity to accept or reject union representation—and consequent merger into the existing multiplant contractual unit—when they participated in the Board-conducted election that preceded the certification at Charlotte.[13] There was no evidence that the Charlotte employees objected to or resisted in any way their

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[11] *Hygrade Food Products Corp.*, 85 N.L.R.B. 841 (1949), on which petitioner relies (Pet. 18), is not to the contrary. There, the Board found that the bargaining history reflected in the record did not support a conclusion that the parties intended to establish a multiplant unit. *Id.* at 844–846. Moreover, to the extent that *Hygrade* required an express commitment by the parties to establish a multiplant unit, it was effectively limited in *White-Westinghouse Corp., supra*, 229 N.L.R.B. at 672. And see *General Electric Co., supra*, 180 N.L.R.B. at 1095 n.6

[12] Since the Board provided a thorough and detailed explanation of how the parties' bargaining history established the appropriateness of the multiplant unit for collective bargaining purposes (Pet. App. 7a–12a), there is no merit to petitioner's assertion (Pet. 4, 12, 14) that the Board failed to articulate properly the basis for its determination, in violation of this Court's decision in *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965). Similarly, petitioner's argument (Pet. 12, 16–17) that the court of appeals failed to review properly the Board's findings must also be rejected; the court adequately discharged its function when it concluded that there was substantial evidence in the record as a whole to support the Board's finding that the Charlotte unit was merged into the multi-plant unit (Pet. App. 3a).

[13] Petitioner's assertion (Pet. 7 & n.3, 23 & n.15) that the Charlotte employees were led to believe that they could decertify after one year is not supported by the record. The employee testimony (A. 173, 182, 189, 224)

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amalgamation with the other employees covered by the multiplant agreement. In these circumstances, the Board properly concluded that by electing Union representation and acquiescing in coverage by the pre-existing multiplant agreement, the employees indicated their desire to be included in the existing multiplant unit covered by the contract. *Lever Brothers Co.*, 96 N.L.R.B. 448, 450 (1951); *Owens-Illinois Glass Co.*, 108 N.L.R.B. 947, 949–950 (1954).[14]

Nothing in the Act compels the Board to hold a decertification election upon request for every employee unit it has ever certified, regardless of intervening events. The Act's mandate to assure employees "the fullest freedom" in exercising their statutory rights (29 U.S.C. 159(b)) is not an absolute. Rather, it is qualified by other—and sometimes conflicting—statutory policies including the promotion of stability in bargaining relations. See, *e.g.*, *Brooks* v. *NLRB*, 348 U.S. 96 (1954) (employees' uncoerced change of heart during the election year neither requires Board to hold a new election nor authorizes employer to withhold recognition). And see *Westinghouse Electric Corp.*, 115 N.L.R.B. 530, 532 (1956); *Campbell Soup Co.*, *supra*, 111 N.L.R.B. at 235.

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relied upon by petitioner (Pet. 7) reveals that they had the "impression" or "understanding" that they could "get out" of the Union later if they desired. On the other hand, the Union's chief organizer testified that he never discussed decertification possibilities with the employees (A. 596–599, 601–603). The Board made no finding on this issue, but did find (Pet. App. 13a) that the Charlotte employees had sufficient notice that they would be merged into the multiplant unit when they were brought under the coverage of the national agreement. Thus, the Charlotte employees should have been aware that by voting for representation by the Union and eventual merger into the multiplant unit, they would thereafter lose their right to decertify a unit limited to the Charlotte plant.

[14] In *Duke Power Co.*, 191 N.L.R.B. 308, 312 (1971), which petitioner cites with favor (Pet. 20 n.12), the Board found that steam plant employees were not given the option to choose whether to be associated in the larger unit. Here, however, the Board found that the organizing campaign clearly apprised Charlotte employees that such an amalgamation would result from a vote for representation by the Union.

The rule under which the Charlotte employees lost the right to decertify their own unit once they were merged into the multiplant unit simply recognizes the equities of the situation, and the fact that the Charlotte employees' rights were not the only ones at stake. By merging into the multiplant unit, the Charlotte employees gained benefits bargained for over the years by the Union as the agent of the multiplant unit. Since the Charlotte unit's departure from the multiplant unit would have tended to weaken, pro tanto, the larger unit, the Board was entitled to give substantial weight to the right of the majority to be protected from such fragmentation. To permit subgroups to break up an appropriate unit, established and maintained pursuant to the Act, "would be adding destabilizing confusion rather than bringing stability to the situation" and would render responsible collective bargaining next to impossible. *Standard Brands, Inc., Fleischmann Mfg. Division,* 214 N.L.R.B. 72, 74 (1973).

Contrary to petitioner's repeated assertions (Pet. 2–4, 9, 12, 17 n.11), it does not follow from the Board's decision that the Charlotte employees are permanently "locked in" to the multiplant unit. Petitioner may file a unit clarification petition with the Board and, if the Board finds that the preferences of the employees or an employee subgroup are relevant, an election incident to that determination may be ordered. *Libby-Owens-Ford Glass Co.,* 169 N.L.R.B. 126, 128 (1968). And see *White-Westinghouse Corp., supra,* 229 N.L.R.B. at 676; *I.U.E.* v. *NLRB,* 604 F. 2d 689, 696 n. 20 (D.C. Cir. 1979) ("if multiplant bargaining proves unduly burdensome, the Company and the Union may negotiate for unit alteration. If a satisfactory resolution cannot be reached, either party may petition the Board to change the unit").[15]

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[15] Moreover, just as the Act permits the parties to agree to the merger of individual units, it permits them to divide a recognized unit into appropriate independent units by subsequent bargaining history. *St. Regis Paper Co.,* 101 N.L.R.B. 656, 658 (1952).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WADE H. MCCREE, Jr.
Solicitor General

WILLIAM A. LUBBERS
General Counsel
JOHN E. HIGGINS, Jr.
Deputy General Counsel
ROBERT E. ALLEN
Acting Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
LINDA SHER
Assistant General Counsel
LAWRENCE E. BLATNIK
Attorney
National Labor Relations Board

OCTOBER 1980

U.S. GOVERNMENT PRINTING OFFICE : 1980 O - 329-713

Supreme Court, U. S.
FILED
OCT 10 1980
MICHAEL RODAK, JR., CLERK

No. 80-224

IN THE

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OCTOBER TERM, 1980

WESTINGHOUSE ELECTRIC CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, *Intervenor.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY MEMORANDUM

ALFRED W. VADNAIS
FRANK P. PINCHAK
HUMPHREYS, HUTCHESON & MOSELEY
The Crawford Building
308 Walnut Street
Chattanooga, TN 37403
(615) 756-5600

Attorneys for Petitioner,

MARTIN D. MINSKER
SETH P. WAXMAN
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner and Counsel of Record.

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PETITIONER'S REPLY MEMORANDUM

1. The opposition brief of the NLRB demonstrates just how sharply drawn and critically important are the issues in this case. Petitioner's principal contention is that the Board's decisions below violated the express terms of the NLRA and this Court's decision in *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965), by failing to make any finding that the multiplant unit resulting from the alleged "merger" of the Charlotte and other Westinghouse—IUE units constituted an "appropriate" unit within the meaning of Section 9(b) of the Act and by further failing to articulate the relationship between this putative

"merger" and the factors traditionally deemed relevant to any determination of unit "appropriateness." The Board, in its response, readily admits that its decision below included no finding that the multiplant unit including the Charlotte employees was "appropriate." It admits that its decision "did not . . . directly address such customary indicia of appropriateness as proximity of plants, integration of functions, and common management" (NLRB Br. Opp. 7). According to the government, none of this was required because in rendering its decision to dismiss the employees decertification petition "it found the parties' bargaining history dispositive" (*id.*).

The government's contention, plainly stated, is that whenever an employer and union agree to redraft the lines of a bargaining unit, the Board will not inquire as to the appropriateness of that unit. The Board's quotation of *Brom Machine & Foundry Co.* v. *NLRB*, 569 F.2d 1042, 1043 (8th Cir. 1978), as the "established principle[] of law" in this case reveals, as petitioner initially suggested (Pet. 18), that this is indeed the principle that the Board invoked in this case. According to the Board (quoting *Brom*):

> If the certified unit has been changed by contract, the Board [] lies upon the unit recognized by collective bargaining and on that basis holds an election to determine whether the employees wish to continue being represented.

While *Brom* may be an "established principle" in its own context, it was never intended to and cannot obviate the clear language of Section 9(b). *Brom* is not, as the Board suggests, support for the proposition that whenever a union and employer agree to bargain on a multiplant basis, the Board is somehow relieved

of its statutory obligation to determine "in each case" the appropriateness of the resulting unit.

The government's approach is wholly incompatible not only with Section 9(b) of the NLRA, but also with this Court's decision in *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965); and its validity is belied by the Board's own decisions in *e.g.*, *Hygrade Food Products Corp.*, 85 N.L.R.B. 841, 847 (1949), and *Joseph Schlitz Brewing Co.*, 206 N.L.R.B. 928 (1973). Neither *White-Westinghouse Corp.*, 299 N.L.R.B. 667 (1977), *enforced sub nom. IUE* v. *NLRB*, 604 F.2d 689 (D.C. Cir. 1979), nor *General Electric Co.*, 180 N.L.R.B. 1094 (1970), the two cases relied on by the Board, supports a contention that "bargaining history" between an employer and union supplants the statutory requirement that "[t]he Board *shall* decide in each case . . . the unit appropriate for purposes of collective bargaining." 29 U.S.C. § 159(b) (emphasis added). These cases, like many others, hold that bargaining history between the parties is *a factor* to be considered in determining unit appropriateness, but it is not a dispositive factor. *See, e.g., Libbey-Owens-Ford Co.* v. *NLRB*, 495 F.2d 1195, 1199-1200 (3d Cir. 1974); *cf. NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965) ("extent of union organization" is "one factor" but not a controlling factor, in unit determination).[1]

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[1] Moreover, even on its merits the decision below that the "bargaining history" supports a finding of merger is highly suspect. It is not true, as the Court of Appeals stated, that the single multiplant unit "embrac[ed] all of Westinghouse's plants" (Pet. App. 3a). It is also not true, as Board counsel states, that no single plant unit within the coverage of the National Agreement has ever subsequently been excluded, except in instances where a plant has

Moreover, even were bargaining history a dispositive factor, there is simply no way to square the Board's naked assertion in its decisions below that "a controlling history of multiplant bargaining" existed between the parties with the clear command of this Court in *Metropolitan Life* that the Board *explain* rather than simply assert its conclusion in Section 9 cases. *Id.* at 442-44. Now, in its brief, Board counsel attempts repeatedly to correct this patent deficiency by supplying its own reasoning. The brief states, for example:

> Since the Board provided a thorough and detailed explanation of how the parties' bargaining history established the appropriateness of the multiplant unit for collective bargaining purposes (Pet. App. 7-12), there is no merit to petitioner's assertion . . . that the Board failed to articulate properly the basis for its determination in violation of this Court's decision in [*Metropolitan Life*].

(NLRB Br. Opp. 8 n.12). Nowhere in the cited passages of the Board's opinion, however, is there so much as a word explaining "how the Board's bargaining history established the appropriateness of the multiplant unit for collective bargaining purposes . . . ." Board counsel now also claims that the decisions below found that "the parties had created a strong 'com-

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been sold or closed (NLRB Br. Opp. 2 n.4). The record documents several instances in which other unions have attempted, sometimes successfully, to displace the IUE as the bargaining representative even in plants then covered by the National Agreement (B. 530-771). And in at least one other instance, *Westinghouse Electric Corp., Sharon Transformer Div.*, 129 N.L.R.B. 1204 (1961), the Board actually divided a single plant unit covered by the National Agreement into two separate bargaining units. As for the bargaining history of the Charlotte plant, that unit to this day has never negotiated on anything but a purely local level.

munity of interest' among employees who had come to share a broad range of contractually defined terms and conditions of employment negotiated on a group basis" (Pet. App. 8-14). But again one will search the Board opinion in vain to find any such "community of interest" finding. As petitioner pointed out in its earlier brief, it is precisely this finding and others like it that were made in *e.g., White-Westinghouse,* 229 N.L.R.B. at 674-75, and *Libbey-Owens-Ford,* 495 F.2d at 1199-1201, yet are absent from the Board decisions in this case. The government's attempt now to rehabilitate the deficient decisions below by supplying this missing reasoning violates this Court's clear prohibition in *Metropolitan Life* against "post hoc rationalizations" by Board counsel of a Board decision. 380 U.S. at 442-44. If nothing else, this case must be remanded with directions that the Board itself make express findings on whether, and if so why, the multiplant unit is "appropriate".

2. The government's attempt to reconcile its decision below with Section 7 of the Act is revealed by the Board's extraordinary effort to justify its finding that the Charlotte employees had "sufficient" notice that they would be merged into a multiplant unit. The Board acknowledges that the Charlotte employees had no voice whatsoever in the decision to incorporate their Board-certified unit into the terms of the National Agreement but argues that since copies of the National Agreement were circulated during the election campaign, the employees "*should have been aware* that by voting for representation by the union . . . , they would forever lose their right to a unit limited to the Charlotte plant" (NLRB Br. Opp. 9 n.13) (emphasis added).

To say the least, this principle of "constructive" knowledge on the part of lay workers unversed in the intricacies of labor law is utterly incompatible with a decent respect for employee rights under Section 7 of the Act. That workers in a hitherto non-union plant would understand simply by reading a copy of the National Agreement (which consistently refers to constituent "bargaining *units*") that voting to establish a certified local unit might forever bind them into a group encompassing 20,000 workers spread across the country is completely unrealistic. Indeed, its implausibility is demonstrated by a decision of the same Board panel in another case only two weeks prior to the decision in this case. In *Chrysler Corp.*, 227 N.L.R.B. 1256 (1977), the Board invalidated a work rule prohibiting solicitation and distribution of literature except such "as is protected by the National Labor Relations Act." The Board reasoned that the employees, not being labor lawyers, could not possibly be expected to understand what the NLRA provided, and therefore their exercise of statutorily protected rights might be "chilled" by that rule.[2]

Although it tries, the government cannot distinguish *Duke Power Co.*, 191 N.L.R.B. 308 (1971), from this case. In *Duke Power* the union opposed employees'

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[2] The Court of Appeals subsequently denied enforcement of the Board's decision in *Chrysler Corp.* on the basis of the Court's factual finding that the record demonstrated that, since the rule had been in effect for so long, no employee had been misled and thus no rights had been chilled. *Chrysler Corp.* v. *NLRB*, 595 F.2d 364 (6th Cir. 1979). In this case, by contrast, the record contains testimony from Charlotte employees indicating that they had specifically been told that if they joined the union and didn't like it, they could dissolve the union by election (*e.g.*, A. 172, 182).

decertification petition on the grounds, as here, that the individual units involved had been merged into a single multiplant unit. The Board granted the single-plant elections, holding (191 N.L.R.B. at 312):

> We do not agree with the Union's contention that the bargaining history has rendered inappropriate, for purposes of a decertification election, separate steam plant units. At two of the steam plants the Board has certified the Union as the bargaining agent in a unit composed solely of that particular steam plant. The employees were not given the option to choose at the time of the Board's election at these two steam plants whether they wished to be associated with the larger collective-bargaining unit.

This holding is precisely applicable to the petition filed in this case. It demonstrates the Board's error below and identifies a clear conflict within the Board itself as to how cases like this must be administered under the Act. Lower courts have recognized that "[t]he problem whether one or more of an employer's plants constitutes an appropriate bargaining unit has been particularly thorny for the Board." *Operating Engineers Local 627* v. *NLRB*, 595 F.2d 844, 848 n.12 (D.C. Cir. 1979). This case provides a unique opportunity to clarify the Board's uncertainty and to revitalize the guarantees of the NLRA.

3. Nothing in the Board's opposition controverts the fact that its decision has deprived the employees in a recently certified single-plant bargaining unit of any meaningful opportunity ever to decertify the union. The Board argues that subsequent negotiations or a unit clarification petition are remedies that in the fu-

ture may free the Charlotte employees from the "merged" bargaining unit or from the union as a whole (NLRB Br. Opp. 10). But these "remedies" are illusory. The individual employees have no leverage whatsoever to negotiate, and Westinghouse cannot insist on a negotiated change because the scope of a bargaining unit is not a mandatory subject of collective bargaining. There will be no negotiation unless the union decides to alter its position, and this very case is solid evidence that this eventuality is not going to happen.

As regards the supposed unit clarification remedy, Section 102.60(b) of the Board's rules and regulations bars employees from instituting this procedure. And even were Westinghouse to file such a petition, the issues before the Board, and presumably the result, would be precisely the same as those raised and rejected below. As for the asserted "election" that the Board may order "if [i]t finds that the preferences of the employees are relevant" (NLRB Br. Opp. 10), at least two members of the Board are of the opinion that the Board lacks statutory authority to hold an employee election pursuant to a unit clarification petition. *See Libbey-Owens-Ford Co.* v. *NLRB,* 495 F.2d 1195, 1197, 1198 (3d Cir. 1974). The only case in which such an election was ever held was *Libbey-Owens-Ford Glass Co.,* 169 N.L.R.B. 126 (1968), and the Court of Appeals for the Third Circuit, reviewing that decision six years later, noted that "the Board has consistently refused since 1968 to follow and apply "the *Libbey-Owens-Ford* doctrine, even in cases in which were virtually indistinguishable." 495 F.2d at 1198, 1207 (quot-

ing NLRB Chairman Miller). The fact of the matter is that if this Court denies review, the Charlotte employees, and untold thousands like them, will forever be consigned to multiplant units in which they have no effective voice and which they did not choose to join.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED W. VADNAIS
FRANK P. PINCHAK
HUMPHREYS, HUTCHESON & MOSELEY
The Crawford Building
308 Walnut Street
Chattanooga, TN 37403
(615) 756-5600

Attorneys for Petitioner,

MARTIN D. MINSKER
SETH P. WAXMAN
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner
and Counsel of Record.